Petition

NO. 81-1128

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In the Supreme Court of the United States

October Term, 1981

J. Ray McDermott & Company, Inc.,

Petitioner

VERSUS

Signal Oil and Gas Company,
The Louisiana Land & Exploration Co.,
Marathon Oil Company,
The Barge W-701,
Sun Oil Company and
Aquitaine Oil Company,
Williams-McWilliams Company,
Employers' Surplus Lines Insurance Company and
Employers' Liability Assurance Corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does the Personal Contract Doctrine of the Limitation of Liability Act prevent a negligent shipowner who breaches its contract with an innocent party from limiting its liability against a claim by that party?

Where a solely negligent shipowner was required by contract with an innocent party to provide insurance in an amount sufficient to pay all claims, can the Limitation of Liability Act be invoked by the shipowner's insurer to refuse to pay the full amount of the judgment?

When a negligent shipowner has failed to file for limitation of liability within six months in a multiple claims situation, is the shipowner's insurer entitled to a single claim fund under the Limitation Act, or should the multiple fund rule apply?

STATEMENT OF PARTIES

Pursuant to Rule 21.1(b) and Rule 28.1, counsel for petitioner certify that all the parties to this proceeding are named in the caption, and that petitioner, J. Ray McDermott & Company, Inc. (now known as McDermott, Inc.), has no parent corporation, affiliates, or non-wholly owned subsidiaries.

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OPINIONS BELOW

The plaintiffs, Signal Oil and Gas Company, Louisiana Land and Exploration Co., Amerada Hess Corporation, and Marathon Oil Company (hereinafter referred to as "SLAM") initiated this admiralty action to recover damages sustained to a pipeline in which the SLAM group owns a 90% interest. Plaintiffs sued, among other, the Barge W-701, *in rem:* its owner, Williams-

McWilliams Company, Inc. (hereinafter referred to as Williams-McWilliams); Sun Oil Company and Aquitaine Oil Corporation (hereinafter referred to as Sun), and J. Ray McDermott and Company, Inc. (hereinafter referred to as McDermott), *in personam*. Liability and damages were tried separately.

The liability issue was tried on June 4-6, 1973. The United States District Court for the Eastern District of Louisiana entered its Findings of Fact and Conclusions of Law on December 13, 1974, attached as Appendix H. The United States Court of Appeals for the Fifth Circuit affirmed those Findings and Conclusions in an unpublished *per curiam* opinion dated November 29, 1976, attached as Appendix F.

The damages portion of this case was tried on February 27, 1978. The United States District Court for the Eastern District of Louisiana rendered an opinion on April 18, 1979, which was published at 468 F. Supp. 802, and is attached as Appendix E. On September 4, 1981, the Fifth Circuit Court of Appeals, by a 2 - 1 panel, issued an opinion affirming in part and reversing in part the decision of the District Court and remanding the case. This opinion is reported at 654 F. 2d 1164, and is attached as Appendix A. The Fifth Circuit denied petitions for rehearing in the case on October 19, 1981 in a *per curiam* opinion, attached as Appendix I.

GROUNDS FOR JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was rendered on September 4, 1981. Petitions for Rehearing were timely filed and were denied on October 19, 1981.

This petition for writ of certiorari was filed within 90

days of the date Rehearing was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statute involved is the Limitation of Liability Act, 46 U.S.C. §181 et. seq.

The pertinent parts of the Limitation of Liability Act are as follows:

46 U.S.C. §183 (1976) provides:

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount of value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (2) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased

is sufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: PROVIDED, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

46 U.S.C. §185 (1976) provides:

The vessel owner, within six months after a claimant

shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with the respect to the matter in question shall cease.

46 U.S.C. §188 (1976) provides:

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187 and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

46 U.S.C. §189 (1976) provides:

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such

vessels and freight pending: PROVIDED, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners.

STATEMENT OF THE CASE

This cases arises out of damage done to an offshore pipeline (the Marathon Pipeline) by an anchor from the Williams-McWilliams Derrick Barge W-701 on December 20, 1969. The pipeline was owned by SLAM. The damage occurred approximately 50 miles off the coast of Louisiana. At the time of the casualty, the Barge W-701 was time-chartered to McDermott, but the sole responsibility for its operation rested with its owner, Williams-McWilliams. Williams-McWilliams furnished the derrick barge with a crew, under the command of Captain Norman Southon.

McDermott time-chartered the barge from Williams-McWilliams to assist in the construction of an oil pipeline from Sun Platform 1 to Signal Platform A. On December 20, 1969, the Barge W-701 was preparing to leave Signal Platform A, where it had been working for two days, when it encountered resistance in raising one of the barge's anchors. Even though he knew there were pipelines that converged at Signal Platform A, Captain Southon ordered the crew to "dog" the port bow anchor. This utilizes the rise and fall of the sea and the buoyancy of the barge to exert a greater pulling force on the anchor line than the winch alone could generate. Captain Southon's attempt to recover the anchor in this manner resulted in a rupture in the pipeline.

SLAM brought an admiralty claim in the United

States District Court for the Eastern District of Louisiana, with federal jurisdiction being based on 28 U.S.C. § 1333. At the trial on liability, the district court concluded that the accident was caused solely by the negligence of Captain Southon, for which Williams-McWilliams was solely responsible. The ultimate disposition of the parties at the liability trial was that: (1) Williams-McWilliams was liable to SLAM in tort; (2) Sun was liable to SLAM for contract indemnity, except to the extent that it was 10% owner of the damaged pipeline; (3) McDermott was liable to Sun for contract indemnity, except to the extent exempted by Clause 15 of their contract; and (4) Williams-McWilliams was liable to both Sun and McDermott for tort indemnity. These findings were affirmed *per curiam* by the Fifth Circuit.

As required by its contract with McDermott, the sole tort-feasor, Williams-McWilliams, had three policies of insurance which provided coverage for the liability which it incurred as a result of the rupture of the pipeline. Employers' Liability Assurance Corporation issued a primary policy directly to Williams-McWilliams in Louisiana, which policy was in full force and effect on the date of the accident and had limits of $100,000.00. In addition, Employer's Surplus Lines Insurance Company issued an excess policy to Williams-McWilliams which had limits of $400,000.00. Finally, Williams-McWilliams was a named insured on a five million dollar "umbrella" policy issued in Texas to the parent corporation of Williams-McWilliams by Employers' Liability Assurance Corporation. At the trial on damages, the district court held that SLAM was entitled to recover $1,116,234.62 in damages, plus prejudgment interest at the rate of 7% from the date of the casualty, and that Sun was entitled either to recover 10% of that amount or to receive a 10% credit towards whatever amount it

might be determined to owe SLAM in contractual indemnity. The court also held that Williams-McWilliams was entitled to limit its liability to the value of the Barge W-701, which was found to be $450,000.00, and that the "umbrella" policy was not subject to the Louisiana Direct Action Statute, La. Rev. Stat. Ann. §22:655 (West 1978). The Fifth Circuit affirmed these findings. As a result, Williams-McWilliams, the only negligent party, must pay $50,000.00 (the amount of its deductible); its insurers must pay $450,000.00 (the combined limits of the first two policies); and McDermott, because of its contractual obligation to indemnify Sun, which in turn must indemnify SLAM, is responsible for the remainder of the 1.1 million dollar judgment plus 10 years of interest. The Fifth Circuit summed-up the situation nicely, noting that the non-negligent McDermott is "left holding the bag with instructions to fill it". Fifth Circuit opinion, Appendix A, at Page A-5.

REASONS FOR GRANTING THE WRIT

The decision by the Fifth Circuit allowing limitation in this case is contrary to the Limitation of Liability Act Personal Contract Doctrine, as recognized by this Court in *Richardson v. Harmon*, 222 U.S. 96 (1911). A negligent shipowner seeking to limit its liability to a single fund must follow the Act's procedural requirements and cannot gain the benefit of limitation of liability if it breaches its personal contracts. The Limitation Act should not be expanded beyond its original function and, indeed, even its contribution to that function (encouraging investment in the shipping industry) has been criticized by judges and commentators alike as outmoded and no longer necessary. Fifth Circuit opinion (Tate, J., concurring and dissenting), Appendix "A", at Page A-7. *See also*, G. Gilmore and L. Black, *The Law of Admiralty* %10-4, at 821-823 (2d ed. 1975). In view of this criticism, it is incumbent upon this Court to provide

clear and consistent standards for the interpretation of this important federal statute.

ARGUMENT

I. UNDER THE PERSONAL CONTRACT DOCTRINE, WILLIAMS-McWILLIAMS IS ESTOPPED FROM LIMITING ITS LIABILITY AS TO McDERMOTT AND SHOULD PAY THE ENTIRE JUDGMENT.

A. Williams-McWilliams Entered Into a Personal Contract With McDermott.

The Personal Contract Doctrine, a well-recognized exception to a shipowner's right to limit its liability, arises out of the case of *Richardson v. Harmon,* 222 U.S. 96 (1911), in which this Court stated:

> Thus construed, the section (§189 of the Limitation Act) harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his *own fault, neglect and contracts.*

222 U.S. at 106 (Emphasis added). Explaining the doctrine, the Second Circuit Court of Appeals in *Benner Line v. Pendleton,* 217 F. 479 (2d Cir. 1914), *aff'd,* 246 U.S. 353 (1918), stated:

> The rule which has been established is that the shipowner may limit his liability as to contracts or obligations entered into by others on his behalf, or

> imputed to him by law; but he may not limit liability upon contracts which he personally makes or upon obligations which he personally assumes.

217 F. at 507. Charter parties are perhaps the best examples of personal contracts, and the Personal Contract Doctrine has been applied to all three types of charters: Bareboat, *The Nat Sutton*, 62 F. 2d 787 (2d Cir. 1933); time, *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139 (1918); and voyage, *Capital Transport Company v. Cambria Steel Company*, 249 U.S. 334 (1919). Contracts for supplies and repairs have also been held to be personal. Gilmore and Black, *supra* §10-26, at 900.

In this case, Williams-McWilliams had an oral contract with McDermott to furnish the services of its workover barge. This was a personal contract. Under the general maritime law, Williams-McWilliams impliedly warranted to perform its services in a workmanlike manner. Under its contract, it impliedly warranted that it would provide insurance coverage. This Court has recognized that the Personal Contract Doctrine may be applied even though the contract is oral, and contains only implied rather than express warranties. *Cullen Fuel Company v. W. E. Hedger, Inc.*, 290 U.S. 82 (1933).

The essence of the Personal Contract Doctrine is that a shipowner may not limit his liability against a party with which he has a contractual relationship if limitation would be inconsistent with some aspect of that contract. The doctrine was developed by the jurisprudence to prevent a vessel owner from utilizing the limitation statue to evade his contractual obligations. In this case, limitation of liability is totally inconsistent with Williams-McWilliams' contractual warranties to perform its services in a workmanlike manner and to provide sufficient, effectual liability insurance to protect its employer,

McDermott. Therefore, such limitation as to McDermott's claim is precluded by the Personal Contract Doctrine.

B. Williams-McWilliams Breached Its Implied Warranty to Perform Its Services in a Workmanlike Manner.

The District Court found, and the Fifth Circuit affirmed, that the damage to the pipeline was attributable solely to the negligence of Williams-McWilliams. By performing its services in a negligent manner, Williams-McWilliams breached its implied warranty to perform in a workmanlike or safe manner.

One who enters into a maritime contract for repairs or other services impliedly agrees to perform them in a diligent and workmanlike manner, free from negligence. *Todd Shipyards Corporation v. Turbine Services, Inc.*, 467 F. Supp. 1257, 1295 (E.D. La. 1978). This basic duty of workmanlike performance is implied in all maritime service contracts, and is distinguishable from the more particularized *Ryan* indemnity. *(Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124 (1956)). *Fairmont Shipping Corporation v. Chevron International Oil Company, Inc.*, 511 F. 2d 1252, 1259 (2d Cir. 1975). The warranty of workmanlike performance may be breached by non-negligent as well as negligent conduct. *Italie Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964).

In its opinion, the Fifth Circuit equated the implied warranty to provide a seaworthy vessel with the warranty of workmanlike performance, indicating that neither warranty was breached because the vessel was found to be seaworthy. However, the seaworthiness of the barge

is irrelevant to a determination of whether the warranty of workmanlike performance was breached. McDermott is not claiming that Williams-McWilliams manned the vessel with an incompetent captain, thus making the barge unseaworthy; rather, it is claiming that because Captain Southon was negligent in the performance of his duties and Williams-McWilliams is responsible for that negligence, Williams-McWilliams failed to perform its services in a workmanlike manner. This breach of its warranty of workmanlike performance estops Williams from limiting its liability as to McDermott, under the Personal Contract Doctrine.

C. Williams-McWilliams Breached Its Warranty to Provide Over Five Million Dollars of Effectual Liability Insurance to McDermott.

The District Court found that during the course of business dealings between Williams-McWilliams and McDermott, "in keeping with its contractual obligations to McDermott, Williams-McWilliams would have its insurance agent send McDermott notices of Williams-McWilliams' insurance coverage." District Court opinion, Appendix "E", at Page E-3. At the time of the contract, Williams-McWilliams had total insurance coverage of 5.5 million dollars. In its opinion, the Fifth Circuit conceded that McDermott undoubtedly relied on this insurance information when making its decision to employ Williams-McWilliams. Fifth Circuit opinion, Appendix "A", at Page A-25 n. 2. Thus, we submit that McDermott entered into its contract with Williams-McWilliams upon the latter's warranty that it had over five million dollars of excess insurance to protect McDermott against any claim that might arise out of the performance of the contract. Nevertheless, when such a claim did arise, Williams-McWilliams asserted that it

was entitled to limit its liability to the value of the vessel, thus rendering the insurance totally ineffectual and leaving the innocent McDermott to pay for the consequences of Williams-McWilliams' negligence.

A breach of a contractual warranty may be a personal contract to which the limitation of liability does not apply. *The Soerstad,* 257 F. 130 (S.D.N.Y. 1919). Here, limitation by Williams-McWilliams is clearly a breach of its warranty to provide effective insurance coverage to McDermott. Williams-McWilliams, in contracting with McDermott, promised to do something (provide insurance coverage up to 5.5 million) that is totally inconsistent with limitation of liability as to McDermott. Therefore, the Personal Contract Doctrine must prohibit such limitation.

The Fifth Circuit expressed the opinion that Williams-McWilliams did not breach its warranty because it actually purchased insurance within the stated limits, even though the insurer refused to pay the judgment within its policy limits and the insurance could not be reached under the Louisiana direct action statute. According to the Fifth Circuit, "McDermott's quarrel . . . is with Congress and the Louisiana legislature, not with Williams." Fifth Circuit Opinion, Appendix "A" at Page A-13. This misstates the issue. Under the circumstances, of which the inaccessability of the excess insurance under the direct action statute is one, limitation of liability by Williams-McWilliams is a breach of its warranty to provide sufficient insurance coverage. As Justice Tate, who dissented on this point, stated:

> The insurance secured by Williams was intended to and did cover the loss here involved.

> Absent Williams' assertion of its limitation-of-liability defense as against McDermott, the policy would indeed cover this loss. Williams' assertion of this defense as against McDermott is a breach of its "personal" warranty to secure and maintain insurance coverage to protect McDermott against Williams-caused liability.

Fifth Circuit Opinion (Tate, J., concurring and dissenting), Appendix "A", at Page A-35

As Justice Tate pointed out, the function of the Act (to protect shipowners) will not be impaired by prohibiting Williams-McWilliams from availing itself of the statutory limitation of liability in a case where it has contracted to protect the claimant, McDermott, against exposure to liability (not limited to the value of the vessel) by agreeing to provide insurance coverage in a stated amount. The Personal Contract Doctrine affords a traditionally accepted rationale that would achieve this equitable result by permitting McDermott to receive the protection intended through its personal contract with Williams-McWilliams. Fifth Circuit Opinion (Tate, J., concurring and dissenting), Appendix "A", at Page A-35 In short, the lower courts have gone out of their way to do a gross injustice in this case to a totally innocent party. This Court should not permit such an unwarranted extension of the Limitation Act.

II. THE LOWER COURTS IMPROPERLY PERMITTED A SINGLE LIMITATION IN A MULTIPLE CLAIMS CASE EVEN THOUGH THE SHIPOWNER FAILED TO COMPLY WITH THE STATUTE.

In this case, Williams-McWilliams did not raise the

defense of limitation within six months of the notice of the claim, but waited and raised this defense for the first time in its Answer filed on March 16, 1971. It neither surrendered its vessel nor did it post security. McDermott respectfully submits that the filing of a limitation defense in separate answers to separate claims requires Williams-McWilliams to post separate limitation funds for plaintiff's claim as well as the indemnity claims of McDermott and Sun. *Cincinnati Gas & Electric Company v. Abel*, 533 F. 2d 1001 (6th Cir. 1976); *The West Point*, 83 F. Supp 680 (E.D. Va. 1949).

In *The West Point*, the Court held that a vessel owner could confine its liability to a single fund only by filing pursuant to the requirements of Section 185 of the Limitation Act. The Court stated:

> Undoubtly limitation of liability may be pleaded by answer alone. Moreover, when the limitation is interposed by answer, the personal liability on the claim thus answered, cannot exceed the value of the respondent's interest in the vessel. But if there is more than one claim, then the defendant-owner can confine its aggregate liability on all the claims to the single value of the vessel, or his interest therein, only by the petition prescribed by the statute, 46 U.S.C. §1855. If he does not follow the procedural steps of the statute, but uses the answer to raise such defense, the owner may be held personally liable on each claim to the extent of the value of his ship, or his interest in her.

83 F. Supp at 681.

Commenting on the procedure under the Limitation Act, Gilmore & Black state:

> To save himself the expense of filing a limitation complaint and posting security, a shipowner might be tempted to wait until some claimant has instituted an action and then plead the Limitation Act in his answer. However, if he is competently advised, he will always proceed by filing a §185 Complaint except in a single claim situation. . . .

Gilmore & Black, *supra* §10-15, at 858 - 859. Thus, since Williams-McWilliams did not file a timely Section 185 petition, its insurers should be required to respond by paying the limitation fund on a multiple basis rather than on a single fund basis.

CONCLUSION

Williams-McWilliams breached its personal contract with McDermott by failing to live up to its warranties to perform its services in a workmanlike manner and to provide complete insurance coverage. Under the Personal Contract Doctrine, Williams-McWilliams should not be able to limit its liability as to claims by McDermott. Futhermore, since Williams-McWilliams did not file its limitation claim within the six month period, its insurers should be required to pay multiple funds rather than a single fund. By allowing this limitation, the Fifth Circuit has expanded the Limitation Act beyond its original function and has achieved a grossly inequitable result, forcing McDermott to pay for over half of a 1.1 million dollar casualty caused solely by negligence of Williams-McWilliams. This Court should not allow that result to stand.

Respectfully submitted,

_____

ROBERT B. ACOMB, JR.

CERTIFICATE

I hereby certify that three copies of the above and foregoing have been sent to each opposing counsel of record, by depositing same in U.S. Mail, postage prepaid, this 11th day of December, 1981.

I further certify that all parties required to be served have been served.

ROBERT B. ACOMB, JR.

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APPENDIX I - Denial of Petitions for Rehearing by the Fifth Circuit Court of Appeals, October 19, 1981

APPENDIX A

SIGNAL OIL & GAS COMPANY, et al.,
Plaintiffs-Appellees, Cross-Appellants,

v.

The BARGE W-701, et al., Defendants,
Sun Oil Company and Acquitaine Oil Corporation,
Defendants-Appellees, Appellants-Cross-Appellees,

Williams-McWilliams Company,
Defendant-Appellee, Cross-Appellee-Cross-Appellant,

Employer Surplus Lines Insurance Company, et al.,
Defendants-Cross-Appellees, Cross-Appellants,

J. Ray McDermott and Company, Inc.,
Defendant-Appellant, Cross-Appellee.

No. 79-2791.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
UNIT A

Sept. 4, 1981.

Pipeline owner sued vessel, vessel owner, oil company and contractor seeking damages for rupture of pipeline. After previous determinations of liability and following trial on issue of damages, the United States District Court for the Eastern District of Louisiana at New Orleans, Jack M. Gordon, J., 468 F.Supp. 802, gave

judgement from which appeals and cross appeals were taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) where barge superintendent was experienced, able captain with good safety record and was not incompetent but merely negligent in freeing anchor, there was not breach of warranty of seaworthiness or workmanlike performance, as bearing upon whether personal contract doctrine precluded statutory limitation of liability; (2) vessel owner violated no duty in failing to promulgate formal written procedures for freeing anchors and unfouling lines, but, rather, could rely on skill and judgement of its superintendents; (3) that limitation-of-liability statute allowed vessel owner and its insurers to cut losses they otherwise would have suffered did not make coverage "ineffectual," in violation of agreement to furnish coverage, so as to invoke "personal contract doctrine" in denial of benefits of statutory limitation of liability; (4) finding as to value of barge was not clearly erroneous; (5) six-month limitation on proceedings on petition by shipowner for limitation of liability is not applicable to defense of limitation of liability, which defense may be later raised; (6) vessel owner's decision to plead limitation of liability as defense in single action with multiple claimants, rather than to petition for limitation, does not open vessel owner to greater total liability; and (7) liability findings of lower court which had been affirmed previously by Court of Appeals were law of the case and could not be disturbed.

Affirmed in part; reversed and remanded with instructions to allow recovery of attorney fees for prosecuting tort claim, though not for establishing right to indemnification.

Tate, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE, TATE and WILLIAMS, Circuit Judges.

GEE, Circuit Judge:

This appeal marks the second time this sad affair of a ruptured pipeline has been before this court. A bifurcated trial was ordered below, and the liability findings and conclusions were affirmed per curiam in an unpublished opinion by a panel of this court in 1976. The decision rendered by the district court in the damages portion of these proceedings, recorded at 468 F.Supp. 802 (E.D.La.1979), prompts the present appeal. An abbreviated summary of pertinent facts is presented here; the factual situation and the attendant relationships among the several parties are more than a little confusing, and the district court opinion adequately sets out the facts of the accident and the course of proceedings below.

Signal Oil & Gas Company, Louisiana Land & Exploration Company, Amerada Hess Corporation, and Marathon Oil Company ("SLAM") jointly operated an oil production rig in the Gulf of Mexico off the coast of Louisiana. The SLAM pipeline was the conduit for production from the SLAM platform to shore. Sun Oil Company ("Sun") operated a platform nearby but did not enjoy a similar access to shore. SLAM and Sun negotiated an agreement allowing Sun to hook up to the SLAM pipeline. Sun agreed to indemnify SLAM for any losses it might suffer thereby. Sun contracted with J. Ray

McDermott ("McDermott") to handle this construction. McDermott, in turn agreed to indemnify Sun for any losses incident to the construction. McDermott contracted with Williams-McWilliams ("Williams"), the vessel owner, for the use of a barge and crew in aid of its construction activities. McDermott and Williams did not enter into any indemnity agreement.

While operating near the SLAM platform, the Williams barge fouled anchor on an obstruction—the SLAM pipeline, as was shortly seen. Meeting resistance in his efforts to retrieve the anchor and change positions, the barge superintendent, Southon, ordered a "dogging" technique to free it. In "dogging," the anchor line is drawn tight and secured while the barge is in a trough; when the barge is lifted by the next swell, the power of the sea itself is used to dislodge the anchor. Unfortunately for all concerned, this retrieval also "dislodged" a chunk of SLAM pipeline. SLAM production operations were interrupted and substantial repairs required.

A roundrobin of claims were consolidated for trial. In the liability phase of this bifurcated trial, the judge arrived at the following conclusions: (1) the negligence of the barge superintendent, for which Williams bore full responsibility, was the sole proximate cause of the accident; (2) Williams was consequently liable to SLAM in tort; (3) Sun was liable to SLAM on its contract of indemnity; (4) McDermott was liable on its indemnity agreement to Sun; and (5) Williams was liable for tort indemnity to Sun and McDermott. These findings were affirmed on appeal in an opinion of this court dated November 29, 1976, and are not before us on this appeal.

The tidy circle above, in which the negligent party was to bear the loss, was broken by the judge's more recent decision on damages that prompts this appeal. The district court found SLAM entitled to full recovery of its loss—$1,116,234.62. The tortfeasor Williams, however, pursuant to 46 U.S.C. § 181 *et seq.*, was entitled to limit its legal liability to the value of the barge, subsequently found by the district judge to be $450,000. The insurance carried by Williams in excess of its first $500,000 of coverage was held not subject to the Louisiana direct action statute. The combined effect of Williams' resort to the limitations statute and the inaccessibility to suit of its excess insurance coverage produced a maximum recovery, extractable from Williams and its insurers, of $500,000. Plaintiff SLAM consequently turned to indemnitor Sun for relief and Sun to McDermott. McDermott, left holding the bag with instructions to fill it, is the chief appellant here. It maintains that the district court erred (1) in allowing Williams to limit its liability for the results of this accident; (2) in allowing Williams an improper filing of this limitation; (3) in arriving at an incorrect valuation of the barge; (4) in awarding SLAM recovery of initial, unsuccessful repair costs; (5) in finding the umbrella insurance policy covering Williams unreachable under the Louisiana direct action statute; and (6) in finding McDermott liable on its contract of indemnity to Sun. Plaintiff SLAM, awarded recovery from Williams, its insurers, and McDermott, complains of an insufficient award of interest on its judgment and seeks attorneys' fees expended in securing its tort and indemnity recoveries.

We find no merit in any of McDermott's objections or in SLAM's complaint of an improper rate of interest; accordingly, we affirm the district court on those ques-

tions. We remand for computation and award to plaintiff SLAM of its attorneys' fees incurred in prosecuting its tort claim against Williams.

I. *Williams' Right to Limit its Liability.*

McDermott, a nonnegligent party, has been cast in judgment for over half the award to the SLAM group. McDermott implores reversal to this court of a result "based upon a fragile, interrelated structure of erroneous findings and conclusions, reversal of any one of which will cause the structure to topple." We reject that characterization of the judgment below. McDermott's plight stems from a contract willingly signed and a federal statute of ancient and venerable origin. In rejecting its claims, we turn first to its attacks on the statute's application to this case.

McDermott does not dispute that the nature of the accident and the parties makes this incident generally the kind in which the vessel owner may move to limit its liability. Rather, the argument that this limitation defense should have been denied Williams relies on McDermott's allegations that by its actions Williams has incurred liability that traditionally escapes the statute's protective sweep. McDermott argues that Williams' actual liability should exceed the limitation amount under the "Personal Contract Doctrine."

[1] Properly invoked, this doctrine deprives a shipowner of the benefits of limitation and exposes him to the full burden of liability his actions produced. Surveying the history and purpose of the limitations statute, the Supreme Court in *Richardson v. Harmon*, 222 U.S. 96, 107, 32 S.Ct. 27, 31, 56 L.Ed. 110 (1911), wrote:

> Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort nonmaritime, but leaves him liable for his own fault, neglect, and contracts.

McDermott argues that Williams now must answer for its "own fault, neglect, and contracts" apart from its vicarious liability for the negligence of its barge superintendent, which latter liability has been limited under the federal statute. The elements of this alleged fault are: (1) provision to McDermott of an unseaworthy vessel; (2) breach of an implied warranty to perform services in a workmanlike manner; and (3) breach of Williams' warranty to McDermott that it enjoyed "effectual" insurance coverage.

Before further considering its application to this case, we examine briefly the nature of the Personal Contract Doctrine. The cryptic reference in *Richardson* to the vessel owner's inability to limit liability for his own fault, neglect, and contracts, rather than those of his captain and crew, does not offer much guidance. This language could have been read to mean that limitation was available only against tort claims—that such a contractual undertaking by a vessel owner as with a shipper, for example, was not subject to the statute despite satisfaction of the stated requirements for limitation. As noted by G. Gilmore & C. Black, *The Law of Admiralty* § 10—26, at 899 (2d ed. 1975) (hereinafter Gilmore & Black), subsequent cases have rendered such a reading of the doctrine improper. "It is by no means clear exactly what a 'personal contract' is, but it is clear that not all

contracts are 'personal', even though entered into personally by the shipowner." *Id.* Analysis of the cases delineating the types of contracts that fall within the designation "personal" is of scant assistance to our inquiry. For example, bills of lading have been held not to be personal contracts, *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 53 S.Ct. 200, 77 L.Ed. 403 (1932); Gilmore & Black, § 10—26 at 899. Charter parties on the other hand, have been four times treated as personal contracts by the Supreme Court in denying limitation to vessel owners. Gilmore & Black, *id.* The parties have not directed our attention to, nor have we found, any case discussing the proper characterization of this contract for the services of a workover barge in offshore oil production.

The initial characterization, moreover, does not necessarily dispose of the question whether liability resulting from a vessel owner's contractual relationships is properly subject to limitation under the statute: "To call a given type of contract 'personal' does not automatically lead to the conclusion that the shipowner will under all circumstances be denied the right to limit against the claims of his promisee." Gilmore & Black, § 10—27 at 904. Learned Hand, sitting as a district judge in *The Soerstad*, 257 F. 130 (S.D.N.Y.1919), suggested a narrow reading of the personal contract doctrine, restricting its application to situations in which the breach, as well as the execution, of the contract could be said to be "personal" to the vessel owner. His approach in *The Soerstad* has gathered support in subsequent cases, including dicta considered supportive by Gilmore & Black, *see* § 10—27 at 904—05, in *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U.S. 82, 88—89, 54 S.C. 10, 11, 78

L.Ed. 189 (1933).[1] There is no more recent or more certain authority. This case, however, does not require us to fill that gap. Whether *The Soerstad's* narrowing of the personal contract doctrine is correct or appropriate need not concern us here; McDermott, the party seeking application of the doctrine, presents its grounds for Williams' liability in post-*Soerstad* terms: breaches of warranties of seaworthiness, performance in a workmanlike manner, and provision of "effectual" insurance coverage. McDermott makes no claim that Williams should be denied limitation simply because it personally agreed to provide the vessel in aid of the construction operation. We leave, then, further consideration of the scope of the personal contract doctrine to scholarly commentators and to judges directly confronting the issue.

[2] Williams is entitled to limit its liability for the results of the rupture of the SLAM pipeline unless its culpability falls within the personal contract doctrine. We have examined McDermott's grounds for disallowing Williams' limitation here and find them unpersuasive. As a preliminary matter, we note that McDermott's attempt in this damages portion of the proceeding to attribute fault to Williams beyond the negligence of the barge superintendent, found the cause of the accident in the liability hearing, may run afoul of the "law of the case" doctrine. This doctrine, "a restriction self-imposed by the courts on themselves in the interest of judicial efficiency, generally operates to

1. The petitioner urges that the denial of limitation in cases like this will sweep away much of the protections afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control."
(citing, among other cases, *The Soerstad, supra*).

preclude a reexamination of issues decided on appeal, either by the district court on remand or by the appellate court itself upon a subsequent appeal." *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. 1981). Unlike res judicata, law of the case does not operate to bar subsequent consideration of matters that could have been, but were not, raised and resolved in the earlier proceeding. Like the doctrine of collateral estoppel, it prohibits relitigation only of matters decided, expressly or by necessary implication, in the prior appellate proceeding. *Id.* at 1062.

At least the first two of McDermott's asserted grounds for invocation of the personal contract doctrine (provision of an unseaworthy vessel and breach of warranty to perform services in a workmanlike manner) may be barred by the law of the case. The trial judge found in the liability phase of this bifurcated proceeding tht the negligent action of the barge superintendent in "dogging" the anchor free was the sole proximate cause of this injury and that the barge W—701 was a seaworthy vessel. These creative warranty arguments were either rejected by the trial judge or never presented to him in that proceeding, where they could properly have been argued. The liability findings have been affirmed by this court and cannot be disturbed. Generally, in applying the law of the case doctrine, it makes a difference whether the challenged issue or claim was actually presented to the earlier courts for their decisions. Whether or not raised in the court below, however, these two warranty claims must be considered rejected by necessary implication in the trial court's conclusion that Southon's negligence *alone* caused the accident.

As we have noted, however, the law of the case doctrine is "a restriction imposed by the courts on

themselves in the interests of judicial efficiency." *Id.* at 1061. Considering the uncertain application of the doctrine to this case and the substantively weak grounds upon which McDermott bases its attempt to invoke the "personal contract" exception, "judicial efficiency" is best served here by disposition of McDermott's arguments on their merits.

[3, 4] Even if the first two warranties were made and could theoretically form the basis of a recovery beyond the limitation fund, they were not here breached. McDermott's seaworthiness and workmanlike performance arguments would impose on Williams a responsibility more direct than respondeat superior for the barge superintendent's negligent act. In loosing on an unsuspecting world an inadequately trained and poorly schooled master of the vessel, the argument runs, Williams has incurred a liability that should penetrate the statute's protective cover; it must answer for its "own fault, neglect, and contracts." Whether the law might support McDermott's contentions need not concern us, since the facts clearly do not. The trial judge found that "the on-the-job training which was provided to him [Southon, the barge superintendent] created an obviously capable man with an excellent reputation . . ." 468 F.Supp. at 815. In ten years as a barge superintendent Southon had suffered only one similar incident. He was an experienced, able captain with a good safety record. As the district court found "it is clear that Captain Southon was not incompetent but merely negligent." 468 F.Supp. at 814. Furthermore, despite McDermott's vigorous argument to the contrary, we find that Williams violated no duty in failing to promulgate formal written procedures for freeing anchors and unfouling lines. Its reliance on the skill and judgment of its superintendents does not become negligently

misplaced merely because of this accident. The attempt to bootstrap the negligence of Southon into a breach of warranties of seaworthiness and workmanlike performance is insupportable in fact. From the results of its employees' negligence, Williams is entitled to the full benefit of the limitation statute.

[5] The third claim of breach of warranty, that Williams failed to secure its promised insurance coverage, is of a different stripe. Here at last is a claim of fault unconnected with Southon's negligent conduct. This ground for denial of limitation arises from an alleged contractual breach related to the accident only by the fact that, absent that accident, Williams' insurance coverage would simply not not have been an issue. As a theoretical matter, a claim of this nature might well be the source of a recovery outside the scope of the limitation of liability statute. It could perhaps have formed the basis for an independent suit against Williams; that avenue has apparently been forsaken, however, as Williams' alleged breach is raised for the first time on this appeal as a reason for denying limitation under the statute. While differently based than the first two warranty charges, this claim is entitled to no more sympathetic a reception.

The warranty of "effectual insurance," if such there be, was simply not breached here. Williams purchased all the coverage indicated in its notices of insurance to McDermott. That insurance was in effect and available to satisfy appropriate claims. Unfortunately for McDermott, a statute embodying the congressional policy of encouraging the mid-nineteenth century American shipping industry allowed Williams and its insurers to cut the losses they otherwise would have suffered. Under these circumstances, the trial court's decision that the

umbrella insurance policy held by Williams' parent corporation could not be reached directly, *see* Part IV, *infra*, does make this coverage in some sense "ineffectual," as leaving McDermott liable for an unanticipated loss. McDermott's quarrel, however, is with Congress and the Louisiana legislature, not with Williams. In this instance McDermott stands exactly where it would in any one of the 48 states that allow no direct action against insurers. Insurance in those states is clearly not "ineffectual" merely because tortfeasors alone, and not their carriers, may be sued.[2]

After review of the arguments raised to avoid application of the limitation statute here, we arrive at the same conclusion reached by the district judge: Williams is entitled to limit its liability to the value of the barge W—701 at the time of the accident. Resolution of that question, however, does not end our inquiry into the application of the statute to the facts of this case. We turn next to McDermott's challenge to the trial court's decision about the value of the offending barge.

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2. In reaching this conclusion, we have considered the position advanced in Judge Tate's partially dissenting opinion but are, for several reasons, unable to espouse it. As noted above, McDermott apparently raised this alleged "warranty of effectual insurance" for the first time on this appeal. In its original answer and cross-claim against Williams filed in February 1971, McDermott alleged generally "that it is entitled to recover over and against Williams-McWilliams Company and its insurers for breach of contract . . . ." No more specific allegation was made of a breach of any warranty of effectual insurance.

In the liability phase of these proceedings, the district judge determined that Williams' liability to McDermott lay in tort (specifically, maritime tort indemnity) and not contract; this finding alone would possibly conclude the matter on principles of the law of the case. In the damages phase of the trial, when the issue of limitation of liability was directly addressed and all counter-arguments

Footnote 2 (Cont'd)

were to be raised, the record is silent on any allegations of such breach. No mention was made of this warranty or its breach in the pretrial order or at the trial on damages. McDermott raised the "personal contract" exception to limitation of liability in the lower court proceeding but did so in only a very general manner; unlike its listing of three specific breaches of warranties on appeal, in the district court McDermott appears to have rested on the mere existence of a contract with Williams for its invocation of the personal contract doctrine. McDermott's counsel argued:

> On behalf of McDermott, however, we're in a little bit different position in that we are urging that since the W—701 was operating under a contract with McDermott, and I think we sited [sic] some law to the court on that proposition, that they're not entitled, they were not entitled to limit as to McDermott, regardless as to what they might other-wise be able to do with regard to the other parties. Because we're in a contract relationship, whereas they're in direct relationship with the other parties.

It may be argued in possible mitigation of any procedural irregularity on McDermott's part that this alleged breach of warranty as grounds for invoking the personal contract doctrine could not have been recognized until after the district court's decision on damages and limitations; that explanation highlights the substantive difficulty we have with the dissent's position.

The dissent's conclusion is concisely stated in its final paragraph: "Williams' assertion of this [limitation of liability] defense as against McDermott is a breach of its 'personal' warranty to secure and maintain insurance coverage to protect McDermott against Williams-caused liability." Dissent ms. at 5. We are unable to discern from that opinion, from McDermott's brief, or from a review of the record where this warranty was made by Williams to McDermott. The offer into evidence of the underlying 1965 agreement between Williams and McDermott was withdrawn by McDermott's counsel. Any light it might have shed was thus lost. The 1969 rental agreement between Williams and McDermott contains no express warranties about insurance. Attached and made a portion of that agreement was a schedule listing the insurance coverage on Williams' operations. During the course of their business dealings, Williams provided McDermott with several Advices of Insurance, updating the coverage information. Undoubtedly, prudent businessmen consider such insurance information in decisions about their operations; acknowledging this, however, we cannot go along with the dissent's conclusions:

Footnote 2 (Cont'd)

> [N]evertheless, McDermott entered into its contract with Williams upon the latter's warranty that it had excess insurance to protect against all claims worldwide up to a total of $3 million. Obviously, this would be a consequential factor in McDermott's decision to accept Williams' rate offer and to enter into its contractual relationship with Williams.

Dissent ms. at 2. We are unwilling so to speculate about the parties' intent; we do not find this warranty in the executed contract.

This claimed warranty would operate as a prospective waiver of the limitation statute; the warranty is breached solely by defendant's resort to that statute. If this be breach, it is of a peculiar sort. Williams is to be found in breach of contract because all seven factors listed below coincided in this case; its insurance coverage is rendered "ineffectual" because:

(1) The damages suffered by SLAM exceeded the value of the barge W—701;

(2) SLAM's damages likewise exceeded the amount of Louisiana-based insurance coverage;

(3) McDermott was found liable on its indemnity to Sun;

(4) Sun was held liable on its indemnity to SLAM:

(5) the umbrella insurance policy was not subject to the Louisiana direct action statute because it was delivered in Texas, not Louisiana;

(6) the accident occurred offshore, not in the inland waters of Louisiana; and

(7) McDermott secured no indemnity agreement from Williams.

It is indeed unfortunate that a nonnegligent party is made to assume a portion of this loss; but that does not result from any contractual breach. McDermott bears this liability because of its voluntary execution with Sun of an indemnity agreement. As acknowledged by the dissent (ms. at 1), Williams and McDermott could have agreed to a waiver of Williams' rights under the limitation statute by executing an indemnity agreement. This they did not do. We are unwilling to reach by indirect means what the parties chose not to reach directly.

II. *Value of the Barge W—701.*

46 U.S.C. § 183 provides that the amount recoverable from the owner of a vessel, under the circumstances stipulated in the statute, cannot "exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." Williams' successful limitation of its liability fixed its exposure at a level well below plaintiffs' actual loss. Applying the statutory formula to the W—701, the trial judge found the 1969 value of the barge to be $450,000. With insurance coverage of only $500,000 subject to the Louisiana direct action statute, the liability of Williams and its insurers could consequently not exceed the half-million dollar figure. Plaintiffs were found entitled to recover over $1.1 million for their loss. McDermott, as ultimate indemnitor without recourse, was held liable for the difference. To avoid this notable loss, McDermott argues that the value placed by the trial judge on the barge was far too low; for every dollar about [sic] $500,000 added to the value of the vessel, McDermott's liability drops proportionately.

[6, 7] To succeed in its effort on appeal, McDermott must demonstrate that the trial judge's finding on the value of the barge was "clearly erroneous." *McAllister v. United States,* 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954). "No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure [citations omitted]." *Id.* at 20, 75 S.Ct. at 8. McDermott fails in this difficult showing. There was ample evidence from which the district judge could reasonably have derived a figure of $450,000 for the value of the barge. Three expert witnesses, two for Williams and one for McDermott, testified on the value of the W—701. The Williams' ex-

perts agreed on the $450,000 figure; McDermott's reckoned an amount in the neighborhood of $1.3 million. The careful consideration given this conflicting evidence by the trial court, reflected in its opinion, 468 F.Supp. at 809—11, convinces us that McDermott's shot here is far wide of the mark. On the entire evidence, we are not " 'left with a definite and firm conviction that a mistake has been committed.' " *McAllister,* 348 U.S. at 20, 75 S.Ct. at 8, *quoting United States v. Oregon State Medical Society,* 343 U.S. 326, 339, 72 S.Ct. 690, 698, 96 L.Ed. 978 (1952), and *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).

One argument against acceptance of the $450,000 figure merits brief notice. McDermott points to evidence introduced by Williams at trial that on the date of the accident the barge was insured for $500,000. It argues that under the statute the insured value of a vessel should be the starting point for its valuation and that the correct figure should perforce range upward from there. We are offered neither authority nor persuasive argument why *any* presumption based on insurance coverage should lie, much less a presumption of undervaluation as opposed to overvaluation in securing this insurance. It is common knowledge that, wittingly or unwittingly, items of property are frequently over- or under-insured. Thus, while the amount of coverage or an item may be relevant to establishing its value, it clearly does not lay a floor beneath it. The value of the barge W—701 as found by the trial judge will remain undisturbed on this appeal.

III. *Alleged Defects in Williams' Seeking Limitation of Liability.*

[8] McDermott's final challenge to the limitation

statute's application to this suit is a claim that Williams untimely and inadequately sought the statute's protection. The statute offers two avenues of limitation. A vessel owner may petition the district court, pursuant to 46 U.S.C. § 185, for limitation of liability within six months of written notification to it of a possible claim; under section 185, the owner's petition in a particular case may well be the first filing in court. Section 183, which established the substantive right of a vessel owner to limitation, also allows limitation to be pled as a defense in answer to an earlier filed damage suit. Williams took this route.

McDermott's first procedural objection is that Williams raised the limitation defense in an untimely manner—in its March 1971 answer to McDermott's cross-claim rather than within six months of notice of the claim, as stipulated in section 185. Acceptance of this argument would require a finding that the time requirement for filing a section 185 petition carries over into an assertion of limitation in answer to a complaint. McDermott's approach does not lack some support in the cases. *See, e. g., Cantwell v. Meade,* 120 F.Supp. 406, 407 (E.D.N.Y. 1954) ("I do not believe that it was the intention of Congress to limit the application of section 185 of Title 46, U.S.C.A., to cases in which the shipowner petitioned for limitation . . . . It is my opinion that sections 183(a) and 185 should be read together . . . ."). The better answer, however, is that adopted in *The Chickie,* 141 F.2d 80, 85 (3rd Cir). 1944:

> We think it is abundantly clear, in view of the historical development of the statute, that the time limitation put in section 185 by the 1937 amendment and made expressly applicable to proceeding by petition at the suit of the owner,

> is not to be read into section 183(a) by implication .... To read the time limitation into section 183(a) would militate against the well-settled rule that the courts are to construe the statute liberally. It would tend, without an express declaration by Congress, to increase the economic burden of shipowners, thus placing them at the competitive disadvantage which the statute sought to avoid. (citations omitted]. It would also require that once the sole injured party gave notice of claim, but delayed filing the suit, the shipowner must of necessity bring a proceeding within six months to save his rights, since a libel may not be filed against him by the injured party for more than six months after notice.

See also Deep Sea Tankers v. The Longbranch, 258 F.2d 757 (2d Cir. 1958), *cert. denied*, 358 U.S. 933, 79 S.Ct. 316, 3 L.Ed.2d 305 (1959); *Odegard v. E. Quest, Inc.*, 199 F.Supp. 449, 451 (E.D.N.Y.1961) (pointing out that *Cantwell v. Meade, supra*, must be considered overruled by *Deep Sea Tankers*). At least since *The Scotland*, 105 U.S. 24, 26 L.Ed. 1001 (1881), the right of a vessel owner to raise limitation for the first time in his answer to a complaint has been recognized. It would often frustrate that right to allow it only to that defendant who is sued within six months of receiving written notice of a claim. We find Williams' invocation of the limitation protection timely, coming as it did within the time limit allowed for answers in the Federal Rules of Civil Procedure.

[9] The core of McDermott's second procedural objection is that, when limitation is raised in the answer under section 183, the defendant vessel owner must create multiple limitation funds for multiple claims—or, at a

minimum, for multiple claims that, as here, are of more than one character, where Williams was sued for tort damages by SLAM and for tort indemnity by codefendants Sun and McDermott. Accepting this argument would require, at minimum, doubling the amount for which Williams would be liable and would go far toward erasing the sum owed by McDermott as indemnitor.

III. *Alleged Defects in Williams' Seeking Limitation of Liability.*

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McDermott offers neither substantial authority nor much in the language of the statute for this approach. On the other hand, Williams locates no analogous cases (that is, ones involving a mixture of tort and indemnity claims) *directly* rejecting McDermott's formulation. After examination of the few existing cases and of the structure of the statute, we conclude that a vessel owner's decision to plead limitation as a defense is a single action with multiple claimants under section 183, rather than to petition under section 185, does not open it to greater total liability.

McDermott accurately cites *The West Point*, 83, F.Supp. 680 (E.D.Va.1949), as supporting its position:

> [I]f there is more than one claim, then the defendant owner can confine his aggregate liabili-

> ty on all the claims to the single value of the vessel, or his interest therein, only by the petition prescribed by the statute. R.S. 4285, 46 U.S.C.A. § 185. If he does not follow the procedural steps of the statute, but uses the answer to raise such a defense, the owner may be held personally liable on each claim to the extent of the value of his ship, or his interest in her.

Id. at 681. The cursory resolution of the issue in *The West Point* is less satisfactory, however, than that supplied by another district court in a multiple claim situation. In *Blunk v. Wilson Line of Washington, Inc.*, 341 F.Supp. 1345 (N.D.Ohio 1972), a defendant vessel owner pled limitation in a single answer to forty consolidated claims arising from physical and psychic injuries claimed to have been suffered by school children on a vessel that ran aground. Recognizing the scant comment on this issue since *The West Point*, the court in *Blunk* conducted a searching analysis of the development of the limitation statutes, concluding that the single fund limited to the vessel's value was sufficient to satisfy all the claims. *Id.* at 1349—50. We are likewise convinced and find it insignificant that all forty claims in *Blunk* were of an identical nature, while here differing substantive claims are raised.

An adoption of McDermott's approach would not follow the statutory scheme; it would make the section 183 alternative a most risky and unattractive one. Requiring multiple funds would defy the logic in statutorily encouraging the shipping industry by placing a relatively low cap on potential liability. "Statutory provisions ... for limitation of liability should be construed liberally in order to effectuate their beneficent purposes." *Larsen v.*

Northland Transportation Co., 292 U.S. 20, 24, 54 S.Ct. 584, 585, 78 L.Ed. 1096 (1934). Individually manageable figures, if multiplied, could aggregate a liability mammoth in relation to the value of the vessel involved. In declining so to construe the statute, we recognize a contrary schematic argument—that limiting the satisfaction of all claims to a single fund when limitation is raised as a defense under section 183 arguably removes incentives for vessel owners to avail themselves of section 185 petition procedures, a petitioning vessel owner being liable for the costs of that limitation proceeding itself.

We note that the statute and cases indicate no preference for either limitation alternative; each is to be, within the confine of statutory requirements, equally available and equally attractive to the vessel owner. That no incentive is given to choose one over the other is not troubling. For whatever reasons, an owner may prefer to strike first in establishing the outside limits of its liability by petition under section 185. Requiring multiple funds for multiple claims would limit the practical availability of the section 183 alternative for the prudent owner to the situation where there is a single claimant only. A factual situation not unlike this one suggests the unsatisfactory nature of such an interpretation. For the results of its employee's negligence, a vessel owner is confronted with a single tort claim. Unaware, perhaps, of the existence of indemnity agreements or uncertain of their application to the particular incident, the owner fails to foresee possible tort indemnity claims and delays assertion of limitation until its answer to plaintiff's complaint, filed after the six month period in section 185. Now, unable to petition under section 185, the defendant vessel owner is served with cross-claims by plaintiff's indemnitors. Acceptance of McDermott's multiple claim-multiple fund argument would subject the defendant in this hypothetical case, as

it would Williams, to a liability not contemplated by the statute. Without more and without implying any particular limitation, we find that in such a case, where the multiple claims are properly advanced in a single proceeding and some are in a sense derivative of others, the defendant vessel owner's liability is limited to the single value of its vessel.

IV. *Inaccessibility to Direct Action of Williams' Umbrella Insurance Coverage.*

That Williams was able to limit its liability to the value of the barge W—701 did not alone remit McDermott to its unenviable position here. The value assigned to the barge was $450,000, but Williams enjoyed over $5 million of insurance coverage. The Louisiana direct action statute, La.Rev.Stat.Ann. § 22:655, allows a plaintiff to sue the tortfeasor's insurer directly. In a Louisiana maritime tort case, that the vessel owner may limit its liability is a concern to the plaintiff only insofar as plaintiff's injuries exceed the greater of the value of the vessel or the amount of insurance that can be reached under the direct action statute.

[10] A direct action against the insurer is available when the insurance contract at issue was written or delivered in the State of Louisiana or if the injury occurred within the state. *Webb v. Zurich Insurance Co.*, 251 La. 558, 205 So.2d 398 (1967). The first two policies held by Williams on its operations, totalling $500,000, were clearly subject to direct action; Williams and its insurers readily admit that these policies were delivered to Williams in Louisiana. At the time of the accident Williams enjoyed additional coverage under an umbrella policy secured by its parent corporation, Zapata Norness, from a British insurer; this umbrella policy was

to cover the operations of a score of Zapata divisions and subsidiaries in various locations around the globe. It is this uppermost layer of coverage, totalling $5 million, that McDermott would like held subject to direct action, thus removing McDermott from its costly position.

McDermott's efforts to bring this third policy within the Louisiana statute are unpersuasive. It is undisputed that the accident orccurred in the Gulf of Mexico, well beyond the boundaries of the state. The policy was written in London and delivered to Zapata's corporate headquarters in Houston, Texas. McDermott attempts an argument on "constructive delivery" but is unable, as pointed out by the district judge, 468 F.Supp. at 816, to find any legal or factual support for that position. McDermott argues that it contravenes public policy to allow a company with significant and ongoing business contacts with the State of Louisiana to "evade" the direct action statute by purchase and delivery of insurance by an out-of-state affiliate; what merits, if any, that argument possesses are plainly addressed to the wrong audience. We take the statute as written by the legislature and reject McDermott's theories.

V. *McDermott's Liability to Sun on Their Indemnity Agreement*

[11] In the liability phase of the trial, the district court found McDermott liable on its contract of indemnity to Sun, subject to an exception clause, paragraph 15 of that agreement. Through this agreement McDermott is now made to assume Sun's burden of indemnifying SLAM for its unrecovered loss. McDermott's objections to this obligation on appeal come substantively too little and procedurally too late. The liability findings in the court below have been affirmed previously by this court

and cannot now be disturbed. McDermott makes no argument that paragraph 15, the only question related to its indemnity liability to Sun left open in the earlier proceeding, was misapplied or misunderstood below. That exception related to certain losses, chiefly "remote or consequential damages," that McDermott was expressly not agreeing to satisfy. Rather than complaining, McDermott applauds the district judge's finding that it escapes liability, pursuant to paragraph 15, for over $71,000 in certain consequential damages suffered by SLAM. The paragraph 15 exclusion has no effect on McDermott's general indemnity liability, and thus arguments against imposition of such liability are laid to rest by the law of the case.

VI. *Recovery by SLAM of its Initial Repair Costs.*

[12] McDermott's final complaint on appeal is of the inclusion in the $1.1 million award to SLAM of $77,000 for expenses incurred in an initial, unsuccessful attempt by SLAM to repair the ruptured pipeline. McDermott argues, apparently for the first time in this court, that in attempting this repair SLAM was negligent in failing adequately to test a valve. Once in place, the valve began leaking, necessitating further repairs. McDermott asserts that in allowing this amount the judgment permits plaintiffs to profit from their own negligence. Aside from the small matter that contributory negligence was not alleged by McDermott below, the facts simply fail to support its claim that plaintiffs were negligent in this regard. The repair effort was a tricky one, necessitating some innovative engineering techniques. SLAM understandably wanted to move as fast as possible to hold down its losses and thus those of the potential defendants. Tests done on the valve failed to reveal a broken fitting; other tests that might have revealed the

problem arguably were available. Substantial evidence supports the trial court's findings on the amount of damages properly recoverable by SLAM; the award is fully affirmed.

VII. *Proper Rate of Interest on SLAM's Recovery*

Having considered and rejected McDermott's various points on appeal, we turn now to those raised by SLAM as cross-appellant.

The trial court awarded SLAM over $1.1 million, with seven percent interest to run on that amount from December 20, 1969, the date of the accident. No one argues that the date from which interest runs was improperly set; all accept this court's statement in *Complaint of M/V Vulcan*, 553 F.2d 489, 490 (5th Cir. 1977), that "in admiralty cases the award of prejudgment interest from the date of loss is the rule rather than the exception." That some interest was due is likewise fully accepted. "Discretion to deny interest must be based on the existence of peculiar circumstances, none of which are present in this case." *Id.* at 490—91. The dispute, such as it is, is over the proper rate of interest.

SLAM argues here, as it did unsuccessfully in the court below, that its alleged cost of borrowing money during the period since the accident should have been awarded it as interest—13.4 percent rather than 7 percent. Williams now asserts in a reply brief that seven percent is itself too high and that under a proper construction of the applicable statutes, five percent is the appropriate rate. McDermott says that seven percent is just right. McDermott's original and reply briefs were filed with this court before Williams raised its argument that the seven percent figure erred on the side of

generosity; McDermott, as the one shouldering most of this burden, would undoubtedly accept a reduction from seven to five percent.

[13] Neither argument—that the trial judge set the figure too low or too high—prevails. Williams' request that the rate be lowered is quickly disposed of. This argument is made for the first time in Williams' second appellate brief. There is no indication that the trial judge's alleged mistake in relying on particular statutory interest provisions rather than others was ever brought to his attention. There is no reason to consider this argument now.

[14] SLAM relies on the above-cited *Vulcan* decision for its claim to 13.4 percent interest. In *Vulcan* this court found an award of interest at 12 percent (that particular plaintiff's cost of borrowing) as opposed to the state statutory rate not to be an abuse of that trial judge's discretion. There exist two problems with SLAM's sole reliance on *Vulcan* here: (1) we see no reason to turn the holding of that case inside out to make an award at a rate other than plaintiff's actual cost of borrowing an abuse of discretion; and (2) SLAM, unlike the *Vulcan* plaintiff, offered no proof that it borrowed any money and incurred these higher interest costs. The decision of the trial court to award prejudgment interest at a rate of seven percent is affirmed.

VIII. *Indemnification of SLAM's Attorneys' Fees.*

[15] In filing suit against Williams for maritime tort recovery and in seeking indemnification from Sun, SLAM incurred substantial attorneys' fees. SLAM sought to recover these fees from Sun on Sun's promise to "indemnify and hold [SLAM] harmless from and

against any and all loss, cost, damage, expense, claims, actions and liability on account of any and all damage to and loss of or destruction of any property belonging to [SLAM] . . . arising out of or in connection with the installation, repair and maintenance of said riser on platform A." Because the litany of anticipated liabilities ("loss, cost, damage, expense, claims, actions and liability") did not include the words "attorneys' fees," the district court denied SLAM that item of recovery.

Initially, SLAM did not claim for these attorneys' fees in the district court; that omission was cured in a post-trial submission, and by leave of that court the record on appeal includes an affidavit from SLAM's attorneys of time invested in this matter and a suggested hourly rate. No procedural irregularity was the rationale for the district court's action, as that court clearly denied the award on the merits. The issue was not waived and is properly before us on appeal. SLAM asks this court to find the unwillingness of the district court to order indemnification of SLAM's fees to be error. Sun and McDermott oppose any reversal of the district court's judgment in this regard.

The indemnity agreement between Sun and McDermott expressly obligated McDermott to cover legal fees and expenses incurred in a situation of this kind, and the district judge awarded Sun this reimbursement. the inclusion of that express obligation in the Sun-McDermott agreement emphasized for the district court the apparent inadequacy of the SLAM-Sun indemnity in relying on more general language.

The parties skirmish lightly about the applicable law on this question of indemnity contract interpretation within the context of a maritime tort suit. Mercifully, the parties expend little time or energy on that discus-

sion. They apparently recognize that the proper result in the case does not hinge on resolution of this choice-of-law question. The Louisiana cases cited to us lead to a conclusion no different than those applying the law of another jurisdiction. Indeed, the cases point to no very clear conclusion at all; on at least one of the two questions presented by this general request for attorneys' fees, we are directed to no clear authority from any jurisdiction. On the other, three analogous cases are available from different circuits and thus are not controlling on our disposition, whether as constructions of state or of federal law. Finding no close cases that settle the issues or bind us in our construction of the contract, we have considered cases from within and without Louisiana for whatever persuasive authority they may carry.

In argument before this court on SLAM's request for attorneys' fees in the action below, the parties do not distinguish between fees incurred in SLAM's tort claim against Williams and those resulting from its efforts to secure payment on Sun's (and through Sun, McDermott's) indemnity. We have not been directed to a single case that dealt with a plaintiff indemnitee's recovery from its indemnitor of attorneys' fees incurred in prosecuting plaintiff's claim against the tortfeasor. The cases relied on by SLAM in arguing for a recovery are concerned with the more usual situation—the indemnitee as defendant in a tort suit is allowed, as part of its indemnity recovery from its indemnitor, attorneys' fees incurred in defending against the tort claim. This situation, in which the indemnitee plaintiff turns to its indemnitor for recovery of attorneys' fees is not, judging by the absence of cases, a common occurrence. In those cases allowing recovery by the defendant indemnitee, this court and others have found attorneys' fees properly recoverable in reliance on language in indemnity

agreements no more specific than that present here. *See, e. g., Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979); *Loffland Brothers Co. v. Roberts*, 386 F.2d 540 (5th Cir. 1967); *B & G Electric Co. v. G. E. Bass & Co.*, 252 F.2d 698 (5th Cir. 1958). *See also* 42 C.J.S. *Indemnity* § 13d.

The parties do not directly address the question whether recovery by a plaintiff indemnitee should be as readily available as that of a defendant indemnitee. SLAM offers cases in which defendants have recovered attorneys' fees on general indemnity language and stops; Sun and McDermott are satisfied to point out the factual distinction between this case and those without pointing out a legally significant difference.

We conclude that recovery of attorneys' fees by the indemnitee in this situation, the reverse of the more typical one, is reasonable and within the probable intent of the parties. While not the case here, designation as plaintiff or defentant in a particular lawsuit in which fault is unclear or shared is often little more than the result of a race to the courthouse. In either case, as plaintiff or defendant, the indemnitee's legal fees in the tort action are equally related to the accident. For its attorneys' efforts in prosecuting the tort claim against Williams, SLAM is entitled to recover attorneys' fees on its indemnity agreement.[3]

3. Sun argues that, should it be held liable to indemnify SLAM's attorneys' fees, this liability should pass through to McDermott on their indemnity agreement. McDermott has not challenged this assertion but has limited its argument to the initial question of SLAM's entitlement to fees on its indemnity with Sun. Sun's position is correct but for a reason other than the one it advances. Sun argues that the specific inclusion of the words "attorneys' fees" in its indemnity

SLAM's theory for recovery of indemnity for fees incurred in efforts to secure payment on that indemnity agreement has received previous unfavorable judicial scrutiny. The Eighth, Ninth, and Tenth Circuits have remarked that, under a general indemnity agreement like that here, the indemnitee enjoys no right to recover its legal fees incurred in establishing its right to indemnification. *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192, 198 n.9 (8th Cir. 1974) ("there should be no recovery for fees and expenses incurred in establishing the right to indemnity"); *Flunker v. United States*, 528 F.2d 239, 246 (9th Cir. 1975) ("The award of fees and expenses does not encompass costs necessary to establish the right against the alleged indemnitor"); *Vallejos v. C. E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978) ("It is true that in connection with indemnity claims recovery may generally be had for attorneys' fees and expenses incurred in defense against the principal claim, but not for those incurred in establishing the right of indemnity"). District court opinions within this circuit have likewise so held. *See, e. g., Williams v.* California Co., 289 F.Supp. 376, 380 (E.D.La.1967) ("There can be no recovery for attorneys' services and expenses incurred in establishing the right to indemnification"). We find no Fifth Circuit opinion directly so holding. In a roughly analogous case, however, *Strachan Shipping Co. v. Koninklyke Nederlandsche S.M., N.V.*, 324 F.2d 746, 746—47 (5th Cir.1963) (not a contractual indemnity case), the court "fully concur[red] in the clear

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with McDermott requires McDermott's payment of these fees. But the responsibility specifically assumed by McDermott for attorneys' fees was for those incurred by Sun, not SLAM. McDermott's liability for SLAM's attorneys' fees is not based on the specific "attorneys' fees" language in its agreement with Sun but on its general obligation to make Sun whole for loss or expense arising out of the construction activity.

and logical opinion" of the district judge, who "awarded to the shipowner [the defendant in the tort suit] that part of his attorneys' fees that were incurred in defending against the longshoreman's [plaintiff's] claim but refused to award any attorneys' fees incurred in 'getting the stevedore into the case and establishing that the stevedore, rather than the shipowner, was responsible.' " A decision of the Louisiana Supreme Court is in accord:

> But the fee of $250, claimed by plaintiff company for services of attorneys in the present suit on the indemnity contract, is not a fee incurred "by reason of or in consequence of the bond," since the suit is not against the surety, or the contractor, but is brought solely by the surety in its own interest against the indemnitor.
>
> This fee was properly rejected by the lower court.

Fidelity & Casualty Co. of New York v. Bisso, 179 La. 56, 153 So. 19, 21 (La.1934). We conclude that any recovery of attorneys' fees for services expended in establishing SLAM's right to recover on its indemnity agreement was likewise "properly rejected by the lower court." We decline to hold it within the contemplation of the contracting parties that the indemnitor would have to be taken to court to insure satisfaction of his agreed upon payment.

IX. *Conclusion.*

For the reasons discussed above, we affirm the district

court's findings and conclusions on Williams' right here to limit its liability; the value of the barge W—701; the inaccessibility to direct action of Williams' excess insurance policy; McDermott's liability to Sun on its indemnity agreement; an allowance to SLAM of a recovery for its unsuccessful repair efforts; and an award of interest on the judgment at seven percent. We affirm the district court's denial of attorneys' fees to SLAM insofar as those fees were incurred in establishing SLAM's right to indemnification. We reverse the court's denial of such fees for efforts expended in prosecuting the tort claim against Williams. We remand this issue to the district court for computation of the amount of recovery to which SLAM is entitled in light of this opinion.

AFFIRMED in part; REVERSED and REMANDED.

TATE, Circuit Judge, concurring in part and dissenting in part:

I concur in all portions of the scholarly opinion by the majority save one holding. In my opinion, by virtue of an independent "personal" contract between McDermott and Williams, Williams cannot avail itself of the statutory limitation of its liability, and the majority errs in concluding otherwise.

To recapitulate the facts: SLAM recovers over one million dollars caused by the rupture of its pipeline. The sole fault causing the damage was that of Williams, the vessel owner. Under its contract with McDermott, Williams was performing a part of McDermott's prior contract with Sun, a performance accomplishing Sun's agreement with SLAM.

By virtue of the statutory limitation of liability to the value of the vessel, although Williams is solely at fault,

its liability to SLAM for the damages is limited to five hundred thousand dollars, the value of its vessel plus insurance available through the Louisiana direct action statute. McDermott, although not negligent, is held liable for the excess half-million loss by virtue of indemnity agreements between it and Sun and between Sun and SLAM, although the damages were caused solely by the fault of its subcontractor Williams.

It is not controverted that, if McDermott itself had secured an indemnity agreement from its subcontractor Williams, McDermott would have been totally indemnified by Williams for the damages excess, and that Williams could not avail itself of the statutory limitation of liability. Under the "personal contract" doctrine, the statutory limitation of liability is applied only in accord "with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, . . . *but* leaves him liable for his own fault, neglect, and *contracts.*" *Richardson v. Harmon*, 222 U.S. 96, 106, 32 S.Ct. 27, 30 (1911) (emphasis supplied). A breach of a contractual warranty may be a personal contract to which the limitation of liability does not apply. *The Soerstad*, 257 S.D.N.Y.1919 (Judge Learned Hand). See also Gilmore and Black, The Law Admiralty [sic] 899-905 (2d ed. 1975) and decisions therein cited.

Here, although McDermott's contract with Williams did not include an indemnity agreement, nevertheless McDermott entered into its contract with Williams upon the latter's warranty that it had excess insurance to protect against all claims worldwide up to a total of three million dollars. Obviously, this would be a consequential factor in McDermott's decision to accept Williams' rate offer and to enter into its contractual relationship with

Williams. Even outside of the sophisticated maritime activity field, the requirement of a principal that a subcontractor carry adequate insurance to protect itself from liability (and thus the principal itself from claims arising out of the subcontractor's activities on behalf of the principal) is common in instances where a subcontractor is engaged to perform hazardous operations on behalf of a principal.

I see no reason why Williams should not be held liable for its breach of this "personal" contract by Williams to provide the contracted-for insurance coverage. If Williams (after entering into the contract) had secured from its insurer a clause excluding its risks in the McDermott operations, I am unable to see how a court could hold that this exclusion was not by a breach of the contracted-for insurance coverage, which was designed to protect McDermott against claim arising out of Williams' performance of its contract for McDermott. Similarly, Williams' assertion of its statutory limitation of liability defense should not, as against McDermott, enable Williams to escape the consequences of its breach of its personal contract with McDermott to provide the contracted-for insurance coverage contractually intended to protect McDermott from the very sort of consequence that the majority's decision permits: that McDermott be held liable for tortious acts done by Williams in the performance of its contract on behalf of McDermott.

The limitation of liability act should not be expanded beyond its original function, and indeed even its contribution to that function (encouraging investment in maritime shipping operations) has been criticized as outmoded and no longer necessary. *Maryland Casualty Company v. Cushing*, 347 U.S. 409, 437, 74 S.Ct. 608, 623, 98 L.Ed. 806 (1954); Gilmore and Black, *supra*, at

821-23. (Citing jurisprudential and academic critiques.) In *Cushing*, the effect of the Court's opinion was to hold that no aim of the limitation-of-liability act was impaired by permitting an injured person to recover, over and above the value of the vessel, from any proceeds of the shipowner's liability insurance that were available through direct suit under the Louisiana direct action statute.[1] Similarly, I can see no functional reason why the intent of the limitation-of-liability act, and its purpose not to expose the shipowner himself to claim in excess of the value of his vessel (in order to encourage the shipping industry), will be impaired if the vessel owner in the present instance were made unable to avail itself of the statutory limitation of liability, when it had contracted to protect the particular claimant before the court against exposure to liability (not limited to the value of the vessel) by agreeing to provide insurance coverage in a stated amount sufficient to protect the claimant against the excess of the claim over the value of the vessel. The "personal contract" doctrine affords a traditionally accepted rationale that permits this equitable result and thus permits McDermott to receive the protection intended by its personal contract with Williams. And indeed, Williams by obtaining this intended insurance coverage, has in fact avoided the depletion of its own invested funds, the very purpose sought to be accomplished by the act limiting its liability to the value of its vessel.

I am thus unable to agree with the majority's rationale that Williams did not breach its warranty to provide insurance coverage, simply because it secured coverage

1. I agree with the majority that the present insurance contract, issued and delivered elsewhere than in Louisiana, does not permit a direct action against the insurer under the Louisiana statute.

within the stated limits. It secured coverage that did not apply, due solely to Williams' election, to the present liability aserted against McDermott, in violation of the warranty of the Williams-McDermott contract. By this warranty, it was contractually intended that Williams would maintain liability insurance that would (up to the contract-stated limits) provide coverage for Williams for loss caused by Williams' tort in the performance by Williams of its contract with McDermott.

The insurance secured by Williams was intended to and did cover the loss here involved. Absent Williams' assertion of its limitation-of-liability defense as against McDermott, the policy would indeed cover this loss. Williams' assertion of this defense as against McDermott is a breach of its "personal" warranty to secure and maintain insurance coverage to protect McDermott against Williams-caused liability. By virtue of this personal contract between Williams and McDermott, Williams' asserted limitation does not apply; nor does it serve any functional purpose of the limitation-of-liability act to permit this asserted limitation to apply as against McDermott under these circumstances.

Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
MAY 13, 1980
GORDON, J.

SIGNAL OIL & GAS CO., et al

versus

THE BARGE W—701, et al

CIVIL ACTION

NO. 70-3491

SECTION "I"

The Court met with counsel, in chambers, to consider two motions filed in this matter.

Present:

Bert Cass, Jr., Esq.
Brunswick G. Deutsch, Esq.
attorneys for Williams McWilliams

Henry Read, Esq.
attorney for SLAM

Stanhope B. Denegre, Esq.
Robert B. Acomb, Esq.
attorneys for McDermott

Clarence A. Frost, Esq.
attorney for McDermott's insurers

IT IS ORDERED that the motion of Williams-McWilliams Co., Inc., Employers' Liability Assurance Corporation and Employers' Surplus Lines Insurance Company, to extend time for filing notice of appeal, having no opposition, be GRANTED.

IT IS FURTHER ORDERED that the motion of Williams-McWilliams Co., Inc., to alter or amend judgment be DENIED for the following reasons:

Williams-McWilliams admitted that it was unable to locate any cases where, as here, limitation of liability was pled in the Answer and where the issue of costs associated with the defense of limitation was discussed. As previously noted by this Court in a Memorandum and Order, dated June 14, 1979, there are certain procedural advantages to a § 185 petition which are lost when a party elects to plead limitation in an answer. An award of costs is one such advantage which Williams-McWilliams forfeited by virtue of its decision to plead limitation in its answer rather than by a petition for limitation of liability.

Clerk to serve all counsel.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SIGNAL OIL & GAS COMPANY, et al

versus

THE BARGE W—701, et al

CIVIL ACTION

NO. 70-3491

SECTION "I"

Henry J. Read, Esq. and A. Gordon Grant, Jr., Esq., Montgomery, Barnett, Brown and Read, 806 National Bank of Commerce Building, New Orleans, Louisiana 70112

Brunswick G. Deutsch, Esq. and Bertrand M. Cass, Jr., Esq., Deutsch, Kerrigan & Stiles, 47th Floor, One Shell Square, New Orleans, Louisiana 70139

Robert B. Acomb, Jr., Esq., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, Louisiana 70112

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GORDON, J., District Judge

MEMORANDUM AND ORDER

This matter is presently before the court for the purpose of confecting a judgment in accordance with this Court's Findings of Fact and Conclusions of Law, entered on April 17, 1979. At that time the Court issued a minute entry scheduling a status conference on May 17, 1979, at which conference the parties were to jointly submit a proposed form of judgment. On May 17, 1979, the status conference was held, but the parties confessed that they had not yet been able to reach agreement on the details of the judgment. Therefore, by minute entry of May 17, 1979, the parties were granted a one-week extension of time in which to arrive at a judgment. Since May 24, 1979, the Court has received a separate form of judgment from each of the parties in this matter, with a cover letter from counsel, indicating remaining areas of dispute which apparently cannot be resolved amicably. The relative positions of each side were discussed at the May 17th conference, and are further ventilated in the ensuing correspondence with the Court. The Court has undertaken once again to unscramble a mess in this case, has researched the appropriate law, and resolved the matter as follows:

INTEREST

In its Findings of Fact and Conclusions of Law the Court concluded that the plaintiffs were entitled to an award of pre-judgment interest at the rate of 7% to run from the date of the loss, December 20, 1969. In so finding, the Court relied on the decision of *Complaint of M/V VULCAN*, 553 F.2d 489 (5th Cir. 1977), cert. den. sub. nom. *Sabine Towing and Transportation Co., Inc. v. Zapata Ugland Drilling, Inc.*, 434 U.S. 855, 98 S.Ct. 175,

54 L.Ed.2d 127. However, McDermott now contends that the use of December 20, 1969, as the date from which interest should run is incorrect. This is so, they argue, because (1) since plaintiffs are recovering for loss of use of the pipeline during repairs, an award of interest during that time would constitute a double recovery, and (2) the "date of the loss" is really the date the repair bills were paid, and not the date the pipeline was ruptured, i.e., December 20, 1969. McDermott has cited the Court no authority for this position, either in conference, or in correspondence. The Court's own research reveals that the Fifth Circuit authority is contrary to McDemott's position.

First, in the *VULCAN* decision loss of use was an allowed element of damages and yet the Fifth Circuit affirmed an award of pre-judgment interest co-extensive with the loss of use award. Second, in *Mobil Oil Corp. v. Tug PENSACOLA*, 472 F.2d 1175 (5th Cir. 1973) the Court held that pre-judgment interest would run from the date of collision, even though repair bills were not paid until almost one year after the date of the collision. Furthermore, with respect to the general rule in admiralty that pre-judgment interest runs from the date of the loss, the term "date of the loss" means the date of the collision or of the casualty in question. *Alcoa S.S. Co. v. Charles Ferran and Co.*, 443 F.2d 250 (5th Cir. 1971), cert. den. sub. nom. *Underwriters at Lloyds London v. Alcoa S.S. Co.*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 94. Accordingly, the Court concludes that its original decision is the correct one, and will enter a judgment for interest to run from December 20, 1969.

ATTORNEYS' FEES

In its Findings of Fact and Conclusions of Law, the

Court referred to an award of attorneys' fees only with respect to Sun and McDermott, the only two parties for which this was an issue. SLAM now contends that they are also entitled to attorneys' fees because (1) they prayed for an award of attorneys' fees in the complaint, and (2) they are entitled to attorneys' fees from Sun as a result of their indemnity contract with Sun. These arguments fail for the following reasons.

First, SLAM cites several cases which stand for the proposition that evidence on the issue of attorneys' fees may be taken after judgment, and this is certainly true. However, the general rule is that attorneys' fees are not awarded to a prevailing party without statutory authority for such an award. No such statute exists here. Furthermore, in admiralty, attorneys' fees are neither allowable nor taxable as costs. *American Union Transport Co. v. Aguadilla Terminal, Inc.*, 302 F.2d 394 (5th Cir. 1962); *Sandoval v. Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163 (5th Cir. 1972). See also, *In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974), reh. den. 512 F.2d 1061, cert. dismissed sub. nom. *Monk v. Chambers and Kennedy*, 423 U.S. 886, 96 S.Ct. 163, 46 L.Ed.2d 118; and *Compania Galeana, S.A. v. M/V CARIBBEAN MARA*, 565 F.2d 358 (5th Cir. 1978). SLAM has cited to the Court the case of *Clark v. American Marine Corporation*, 320 F.Supp. 709 (E.D.La. 1970), aff'd. 437 F.2d 959. However, that case involved a suit under Title VII of the Civil Rights Act, which act specifically provides for an award of attorneys' fees to a prevailing party. Accordingly, SLAM is not entitled to an award of attorneys' fees as a result of the main demand.

With respect to SLAM's indemnity agreement with Sun, that agreement did not provide for a recovery of at-

torneys' fees from Sun (See, Liability Findings and Conclusions, p. 4, Finding of Fact No. 6, December 13, 1974), and the Court did not find that SLAM was entitled to attorneys' fees from Sun (See, Liability Findings and Conclusions, p. 19, par. 5). This is in direct contrast to par. 11 of Sun's indemnity agreement with McDermott, which specifically provided for recovery of attorneys' fees. See, Liability Findings and Conclusions, p. 7, Finding of Fact No. 7. Accordingly, there will be no provision in the judgment for an award of attorneys' fees to SLAM.

COSTS

Federal Rule of Civil Procedure 54 (d) provides that ". . . costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ." The usual procedure contemplates the taxing of costs at the end of the case upon the prevailing party's filing a bill of costs with the Clerk of Court. Thus, there is no prohibition to any party's receiving an award of costs merely because, as McDermott contends, no one filed an affidavit of costs prior to trial.

However, the form of judgment submitted by Williams-McWilliams contemplates an award of costs in its favor by virtue of its having been successful in limiting its liability to the value of the barge. In opposition to such an award, SLAM contends that, at best, Williams-McWilliams is entitled only to those costs attendant to the limitation portions of the damages trial, but that Williams-McWilliams must pay SLAM costs on the liability trial. SLAM cites the case of *Petition of Kinsman Transit Company,* 338 F.2d 708, 727 (2d Cir. 1964).

Williams-McWilliams has cited no authority to support an award of costs in its favor. The case of *Petition of Kinsman Transit Company*, ibid., involved a successful § 185 petition for limitation of liability. In the present case, no § 185 petition was ever filed. As the Court noted at p. 16, fn. 2, and at p. 17, fn. 3 of the Damages Findings and Conclusions issued April 17, 1979, there are certain procedural advantages to a § 185 petition which one loses when one elects to plead limitation as a defense in one's answer. An award of costs is one such advantage, and therefore, Williams-McWilliams is not entitled to any award of costs in this matter by virtue of its having failed to file a § 185 petition for limitation.

INJUNCTIVE RELIEF

Likewise, Williams-McWilliams is not entitled to an injunction as requested in its proposed form of judgment, since such relief is available only to one who has filed a § 185 petition for limitation of liability, and who has posted the requisite bond or security.

AMOUNT OF JUDGMENT

The total damages found in this case amounted to $1,116,234.62. Sun is entitled to recover, or be credited, with 10% of that amount, or $111,623.46. In Sun's proposed form of judgment, it seems to have subtracted that 10% credit from what SLAM receives, and then to have subtracted a second 10% from the recovery against Williams-McWilliams and its insurers. These mathematical calculations appear incorrect to the Court, as the 10%, or $111,623.46, is a single credit to which Sun is entitled. Thus, without adjustment for interest or

costs, etc., the monetary breakdown of damages is calculated as follows:

$1,116,234.62	Total damages proved by, and potentially due to, SLAM
− 450,000.00	Limitation Fund
$ 666,234.62	
− 50,000.00	Liability of Williams-McWilliams' insurers over the amount of Limitation Fund
$ 616,234.62	Amount potentially owed to SLAM by Sun
− 111,623.46	Sun's 10% credit
$ 504,611.16	Net due to SLAM by Sun in indemnity and therefore potentially due to Sun by McDermott
− 71,781.38	Overhead and Expenses for which McDermott need not indemnify Sun
$ 432,829.78	Net due to Sun by McDermott in indemnity

CONCLUSION

Based on the foregoing, the Court concludes that a judgment stating the amounts recited above, with 7% interest to run from December 20, 1969, plus costs to plaintiffs, attorneys' fees to Sun, and dismissing all claims against the umbrella insurer of Williams-McWilliams, is correct and should be entered forthwith. Since it is obvious that the parties in this case cannot agree amongst themselves as to a form of judgment, and that no further purpose can be served by another status conference that could not better be served through argument on appeal, the Court will draft its own judgment, and ORDERS that said judgment be entered in accordance with this memorandum and the Findings and Conclusions of April 17, 1979.

New Orleans, Louisiana, this 14th day of June, 1979.

JOHN M. GORDON

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SIGNAL OIL & GAS COMPANY, et al

versus

THE BARGE W—701, et al

CIVIL ACTION

NO. 70-3491

SECTION "I"

JUDGMENT

The Court having made Findings of Fact and Conclusions of Law, dated April 17, 1979, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs, Signal Oil and Gas Company, the Louisiana Land & Exploration Company, Amerada Hess Corporation, and Marathon Oil Company, are entitled to recover the full sum of ONE MILLION, ONE HUNDRED SIXTEEN THOUSAND, TWO HUNDRED THIRTY-FOUR AND 62/100 DOLLARS ($1,116,234.62), with interest at seven per cent (7%) from December 20, 1969, until paid, plus all costs, said judgment to be subject to a 10% credit in favor of Sun Oil Company and Aquitaine Oil Corporation in the amount of ONE HUNDRED ELEVEN THOUSAND, SIX HUNDRED TWENTY-THREE AND 46/100 DOLLARS ($111,623.46), plus interest and costs,

and to be paid to plaintiffs in the following amounts:

FOUR HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($450,000.00) to be paid by Williams-McWilliams Company, plus seven per cent (7%) interest from December 20, 1969, until paid, plus a proportionate share of total court costs, said amount to represent the limitation of liability fund for the Barge W—701;

FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00) to be paid by Employers' Surplus Lines Insurance Corporation, plus seven per cent (7%) interest from December 20, 1969, until paid, plus a proportionate share of court costs, all pursuant to L.R.S. 22:655;

FIVE HUNDRED FOUR THOUSAND, SIX HUNDRED ELEVEN AND 16/100 DOLLARS ($504,611.16) to be paid by Sun Oil Company and Acquitaine Oil Corporation, plus seven per cent (7%) interest from December 20, 1969, until paid, plus a proportionate share of court costs, pursuant to the indemnity obligation of those parties, and which sum represents an indemnity obligation of SIX HUNDRED SIXTEEN THOUSAND, TWO HUNDRED THIRTY-FOUR AND 62/100 DOLLARS ($616,234.62) less a 10% ownership credit to Sun and Acquitaine in the amount of ONE HUNDRED ELEVEN THOUSAND, SIX HUNDRED TWENTY-THREE AND 46/100 DOLLARS ($111,623.46).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sun Oil Company and Acquitaine Oil Corporation recover from J. Ray McDermott & Co., Inc., by way of indemnity, the sum of FOUR HUNDRED THIRTY-TWO THOUSAND, EIGHT HUNDRED TWENTY-NINE AND 78/100 DOLLARS ($432,829.78),

plus any interest and costs paid by Sun and Acquitaine to the plaintiffs, plus attorneys' fees in the amount of SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS ($75,000.00) and costs in the amount of TWO THOUSAND, THREE HUNDRED FIFTY-SIX AND NO/100 DOLLARS ($2,356.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims against Employers' Liability Assurance Corporation under L.R.S. 22:655 on the account of Umbrella Policy No. EG 8559-001 be and are hereby DISMISSED.

New Orleans, Louisiana, this 14th day of June, 1979

JOHN M. GORDON

UNITED STATES DISTRICT JUDGE

Appendix E

SIGNAL OIL & GAS COMPANY et al.

v.

The BARGE W-701 et al.

Civ. A.

No. 70-3491

United States District Court,
E. D. Louisiana.

April 18, 1979.

Pipeline owners sued vessel, vessel owner, oil company and contractor seeking damages for rupture of pipeline. After previous determinations of liability, following trial on issue of damages, the District Court, Jack M. Gordon, J., held that: (1) right of vessel owner to limit liability may be pled as a defense in answer, and vessel owner need not file a petition; (2) by pleading limitation in separate answers to cross claims and main demand, vessel owner did not create multiple limitation funds; (3) record established that captain of barge was not incompetent but merely negligent in causing rupture of pipeline, with result that vessel owner was not precluded from limiting liability in absence of privity with or knowledge of captain's negligence; (4) claimants did not have right of direct action under Louisiana statute against insurer on umbrella policy where accident did not occur within the territorial limits of Louisiana and the policy was not delivered within Louisiana; (5) pipeline owners were entitled to prejudgment interest

only at the legal rate and not at the alleged real cost of borrowing money, in absence of evidence that any money was actually borrowed in order to make necessary repairs to pipeline, and (6) where contract between contractor and oil company required indemnity from contractor whether it was negligent or not, with certain exceptions, indemnity obligation incurred by contractor was not limited to the amount of its insurance even though it was held to be nonnegligent, with contractor and oil company being liable to pipeline owners only on basis of contractual indemnity provisions.

Judgment accordingly.

Henry J. Read, A. Gordon Grant, Jr., Montgomery, Barnett, Brown & Read, New Orleans, La., for plaintiffs.

Brunswick G. Deutsch, Bertrand M. Cass, Jr., Deutsch, Kerrigan & Stiles, Frank C. Allen, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, P. A. Bienvenu, Bienvenu, Foster, Ryan & O'Bannon, New Orleans, La., for defendants.

JACK M. GORDON, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiffs, Signal Oil & Gas Company, Louisiana Land and Exploration Company, Amerada Hess Corporation and Marathon Oil Company (hereinafter referred to as "SLAM") initiated this admiralty action to recover damages sustained by a pipeline in which the SLAM group owns a 90% interest. Plaintiffs sued, among others, the Barge W-701. *in rem;* its owners, Williams Company, Inc. (hereinafter referred to as

"Williams-McWilliams"); Sun Oil Company and Acquitane Oil Corporation (hereinafter referred to as "Sun"); and J. Ray McDermott and Company, Inc. (hereinafter referred to as "McDermott"). The issue of liability was tried June 4, 5 and 6, 1973. The Court entered its Findings of Fact and Conclusions of Law on December 13, 1974. The Fifth Circuit Court of Appeals affirmed those Findings and Conclusions in an unpublished per curiam opinion dated November 29, 1976, Appeal No. 75-2089. The damages portion of this case was then tried on February 27, 1978, after which the parties were given time to prepare post-trial memoranda and the matter was taken under submission. The Court now prepares to make Findings of Fact and Conclusions of Law on the issue of damages.

However, as a prelude to such Findings and Conclusions, the Court will first frame the issues before it in the context of what was determined on the liability issue. Since the original Findings and Conclusions were exhaustively detailed, the Court will only briefly recap them here, and refers the parties to the December 13, 1974 opinion for the minutia.

SLAM initially owned 100% of a 12¾ inch pipeline referred to as the Marathon pipeline, which received oil gathered at Signal Platform A, one of five platforms in Main Pass Blocks 305 and 306. From there, the oil was transported to the Getty Oil Company Terminal in Venice, Louisiana. In 1969, Sun owned and operated Sun Platform 1, located in Main Pass Block 293, adjacent to Main Pass Blocks 305 and 306. For the purpose of transporting to shore the petroleum produced by Sun Platform 1, Sun entered into an agreement with SLAM whereby Sun Purchased a 10% interest in SLAM's Marathon pipeline and SLAM agreed to allow Sun to

connect by pipeline the Sun Platform 1 and the Marathon pipeline at Signal Platform A. Specifically, Sun was permitted to utilize one riser on Signal Platform A to tie its pipeline into the Marathon pipeline. The agreement between Sun and SLAM contained an indemnity and hold harmless clause in favor of SLAM.

In November, 1969, Sun contracted for McDermott to construct a 6-inch pipeline from Sun Platform 1 in Main Pass Block 293 to Signal Platform A in Main Pass Block 305. This contract contained an indemnity and hold harmless clause in favor of Sun, with certain exceptions provided for in clause 15 of the contract. In the course of performing its work under this contract, McDermott was using the derrick barge W-701, owned by Williams-McWilliams. Williams-McWilliams furnished the crew for the Barge W-701, including its captain, Norman Southon.

On December 18, 1969, the Barge W-701 was moved to Signal Platform A by the tug CHARLES J. CENAC, for work to be performed at Signal Platform A. Since the Barge W-701 was a dumb barge, it was always towed from place to place by the CHARLES J. CENAC. On December 20, 1969, the Barge W-701 was preparing to leave Signal Platform A when Captain Southon met with resistance in retrieving the barge's anchors. He therefore utilized a method known as "dogging" the anchor to retrieve the port bow anchor. Later that day an oil slick was sighted near Signal Platform A, which subsequent measures discovered was the result of a rupture in the Marathon pipeline at a point approximately 550 feet from the platform. Based on the evidence adduced at the liability trial, the Court found the sole proximate cause of the rupture in the Marathon pipeline to have been the negligence of Captain Southon in "dog-

ging" the anchor.

Sun and McDermott were each found to be non-negligent with respect to the damage to the Marathon pipeline. However, Sun was found to be liable to SLAM for the damage on the basis of the indemnity clause in its contract with SLAM. McDermott, in turn, was found liable to Sun on the basis of its contractual indemnity agreement, except to whatever extent clause 15 would exempt any items of damage proven at the trial on damages. Faced with such potential liability by contract for the sole negligence of Williams-McWilliams' employee, Captain Southon, both Sun and McDermott were found by the Court to be entitled to indemnity over against Williams-McWilliams on a theory of maritime tort indemnity. Thus, the ultimate disposition of the parties at the liability trial was that Williams-McWilliams was liable to SLAM for contract indemnity, except to the extent it was a 10% owner of the damaged pipeline; McDermott was liable to Sun for contract indemnity, except to extent exempted by clause 15; and Williams-McWilliams was liable to both Sun and McDermott for tort indemnity.

At the trial on damages, SLAM sought to prove over a million dollars worth of damage incurred by the rupture of the Marathon pipeline. Various elements of damage were contested by the others, as well as SLAM's request for prejudgment interest at 13.4%, their alleged cost of borrowing money. Sun sought recognition as a 10% owner of the pipeline, and therefore, the damages. Williams-McWilliams sought to limit its liability to everyone to the value of the Barge W-701, under 46 U.S.C. 181, et seq. Everyone opposed the limitation, and the value of the vessel was contested. Alternatively, everyone sought a direct action against Williams-

McWilliams' $5,000,000.00 umbrella policy under L.R.S. 22:655. Needless to say, the excess insurer claimed that L.R.S. 22:655 did not apply to its policy. McDermott sought to wriggle free of its contractual obligation to indemnify Sun, and many ingenious arguments were advanced by all concerned on the various issues presented. The Court will now attempt to create order out of the chaos with the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1.

SLAM presented invoices, cancelled checks and cash vouchers reflecting the total expenses related to the repair of the Marathon pipeline. These repair expenses amounted to $1,044,453.24. In addition to actual repair expenses, SLAM offered evidence of $71,781.38 in lost overhead and operating expenses for the period of time in which the repairs were conducted. Therefore, the total damages claimed as a result of the 1969 rupture in the Marathon pipeline amount to $1,116,234.62.

2.

The pipeline was repaired between December 21, 1969, and May 21, 1970. The bulk of the repair work was completed by February 26, 1970, when crude oil production flow was restored; the remainder was delayed until the Spring to obtain the benefit of more favorable weather and sea conditions.

3.

Due to the depth of the water and the size of the line, special engineering was required to formulate a procedure to make the repair. The broken end of the line leading to shore was initially lifted to the surface in a single catenary curve. In order to complete repairs, it

was then necessary to install a 12-inch Cameron ASA 900 Ball Valve in the line and then use compressed air to force the ball down the line approximately 3,000 feet. This displaced water from the line and lightened it sufficiently to place the line over a stinger in a double catenary curve. Additional sections of pipe were then added to the line in order to reconnect it to the platform. It was necessary to leave the valve in the line because the valve had to be kept closed in order to maintain the air space in the line between the valve and the ball.

4.

After the line was repaired and back in the water, a 5-day hydrostatic test was conducted from February, 18-23, 1970, during which the line was subjected to a static high-pressure test to determine the existence of any leaks. Chester Rybicki and Fletcher Graham had been supervising the repairs up until this point. Graham inspected the valve prior to lowering the pipeline back into the water and it appeared to be in good condition at that time. Rybicki was present during the running of the hydrostatic tests and they were satisfactorily performed, revealing the existence of no leaks. However, approximately one month later, on March 25, 1970, a leak was detected in the line. Inspection revealed that the leak was due to a broken grease fitting in the ball valve. Of the total cost claimed for repairing the pipeline, $77,149.27 resulted from the repair of the broken grease fitting. See, Exhibits P—40, 41, 43, 44 and 51.

5.

[1] Both Rybicki and Graham explained that the internal seal of the valve is pressure actuated and that a static high-pressure test of this type would not necessarily have revealed the existence of the broken grease fitting. This is so because under actual operating

conditions the internal seal in the valve is subjected to cyclical, not static, pressure conditions ranging from zero to approximately 200 p.s.i. It would therefore only be after several weeks of operation under these cyclical pressure conditions that small quantities of oil would begin to leak past the seal and out of the broken grease fitting. Similarly, Graham's physical inspection of the valve prior to the pipeline's being laid back onto the floor of the Gulf would not reveal any breakage which occurred only during that procedure. The most likely conclusion one could draw from the evidence adduced is that the grease fitting was broken during the course of returning the pipeline to the Gulf floor. Although defendants argued that since the hydrostatic tests were positive, there must have been an intervening cause of the breakage for which they are not responsible, there was no evidence presented which would support such a conclusion. Indeed, the preponderence of the evidence bears in the opposite direction. Accordingly, the Court finds that the $77,149.27 cost of repairing the valve was directly related to the repair of the pipeline itself and the plaintiffs are therefore entitled to include that amount in the total damages recoverable.

6.

[2] After all direct pipeline repairs were completed, including the repair of the valve, and the Marathon pipeline was once more in the bed of the Gulf of Mexico, there existed at the point where the ball valve was located a rise, or protrusion, of the pipeline above the Gulf floor due solely to the existence of the ball valve. The ball valve, of course, existed solely because the pipeline had been ruptured by the anchor of the Barge W-701. Being desirous of an even pipeline with no protrusions, such as existed prior to the rupture, SLAM decided to bury that portion of the Marathon pipeline containing the ball valve. This was done, and of the total

cost of repairs claimed by plaintiffs, the burying expenses amounted to $57,579.11. See, Exhibits P-39 and 49. Defendants argue that they should not be held liable for the cost of burying the valve because it was not necessary and was not directly related to the repairs of any damage actually caused by the anchor. To the contrary, the burying procedure was not only reasonable, but was necessary in order to restore the pipeline to the integrity of its pre-injury condition. The Court, therefore, holds that the plaintiffs are entitled to recover the cost of burying the ball valve.

7.

[3] Based on the testimony of Kaye Adamson and Exhibits P—113 through P—117, the Court finds that SLAM incurred operating expenses and lost overhead in the total amount of $71,781.38 during the course of the repairs to the pipeline, and they are therefore entitled to recovery in that amount.

8.

[4] In the original decision of December 13, 1974, the Court held that McDermott was liable to Sun in contractual indemnity, except to the extent that certain items of damage might be found to be exempted under clause 15 of their contract. That clause reads as follows:

> 15. Any provisions herein to the contrary notwithstanding, Contractor [McDermott] shall not be responsible or liable, as indemnitor or otherwise, for well damage or loss, reservoir damage or loss, *loss of use of any equipment of Sun or any other party,* or for any remote or consequential damages (as distinguished from direct and immediate damages). (Emphasis supplied.) See, Original Finding of Fact No. 7.

Accordingly, the Court finds that McDermott is not liable to indemnify Sun for the $71,781.38 in lost overhead incurred by SLAM.

9.

The damage to the Marathon pipeline occurred on December 20, 1969, and SLAM therefore sent a written notice of claim to Williams-McWilliams on December 22, 1969. See, Exhibit P—119. Suit was filed December 14, 1970. Williams-McWilliams pled the defense of Limitation of Liability under 46 U.S.C. 181, et seq. in its answer to the complaint on February 16, 1971; it likewise pled Limitation as a defense in its answer to Sun's cross-claim on March 12, 1971, and to McDermott's cross-claim on March 16, 1971. No Petition for Limitation was ever filed pursuant to 46 U.S.C. 185, and no bond or other security was ever posted on behalf of Williams-McWilliams.

10.

[5] In december, 1969, Norman Southon was the Barge Superintendent of the Barge W-701, and was totally in charge of the barge while it was offshore. His immediate supervisor at Williams-McWilliams was Fred Lohman, who was the general superintendent of the Construction Division. Lohman's supervisor was William Rose, a Williams-McWilliams Vice-President, in charge of Offshore Construction Operations. Rose answered to Carl Hicks, who in turn answered to O. M. Gautreaux, the President of Williams-McWilliams. Thus, while Southon's knowledge of any mechanical defects or deficiencies in the Barge W-701 might be imputable to the corporation, his own personal negligence in operating the barge would have had to have come into the knowledge of either Lohman or Rose, in order for the corporation to have imputed knowledge of Southon's negligence.

11.

Norman Southon was hired by Williams-McWilliams in 1955 as a journeyman rigging and ironworker on the barge HUMBLE DB-1. In 1959 he was promoted to Barge Superintendent, in charge of the EXXON DB-1, as well as the derrick barge W-701 in 1960. Within the Williams-McWilliams organization the term "Barge Superintendent" was synonymous with the term "Captain," to the extent that no one else was in charge of say, the Barge W-701, for purposes of navigation when Southon was on board. This is not to say that Southon actually navigated the Barge W-701, for it was a "dumb barge" with no motive power of its own, but rather, was towed from place to place by a tugboat. During actual movement, then, the navigation of the Barge W-701 was conducted solely by the captain of the tug, while once in place, Captain Southon was in charge of such matters as the placement and retrieval of anchors.

12.

At Williams-McWilliams there was no formal training program in such duties as the handling of anchors, but rather, an on-the-job training program was employed. Thus, in the four years that Norman Southon was a journeyman ironworker, he was under the constant supervision of his then superior, Mr. Mayhall, who trained Southon in all aspects of barge handling, including anchors. William Rose testified in his deposition of January 20, 1978, at p. 55 that Southon would not have been promoted to Barge Superintendent in 1959 if his supervisor had not thought him capable of handling the anchors of a derrick barge by himself. From 1960 until 1975 Norman Southon remained in charge of the W-701 until an automobile accident forced him to retire. In 1969, when Southon had been in charge of the W-701 for approximately ten years, there has been only one

known instance, other than the present one, where Southon had been found responsible for pulling up a pipeline with an anchor. William Rose testified in his deposition that in 1969 Southon had an excellent reputation in the field, and Rose was confident that Southon could handle the barge's anchors well. See, Rose deposition, p. 56.

13.

With respect to the placement and retrieval of anchors while a barge was in a pipeline area, it was Williams-McWilliams' policy that a Barge Superintendent, or Captain, should have an owner's representative on board the barge whenever the barge was operating in "unknown" waters. By "unknown" it was meant that the particular captain had never operated in that particular field before. See, Rose deposition, pp. 43-45. However, it has already been established in this Court's original decision on liability that, although no SLAM personnel were on board the W-701 the day Southon "dogged" the anchor, the location of the pipeline near Signal Platform A had been adequately pointed out to Captain Southon by those working on the project, and in fact, he knew where the Marathon pipeline was. See, Original Findings of Fact Nos. 12-14, and Conclusions of Law, p. 16, par. 3.

14.

With respect to what method would be employed in actually retrieving an anchor offshore when initial attempts meet with resistance, Williams-McWilliams has no specific rules or instructions on this, but leaves the decision to rest on the particular barge captain's experience and common sense. See, Rose Deposition p. 54. In December, 1969, William Rose knew that the Barge W-701 was going to be working at Signal Platform A around December 18-20, because Southon kept in daily

contact with Rose. See, Transcript of Liability Trial, Vol. III, p. 594, l. 10-13. However, on December 20, 1969, when Southon was in the middle of his problems with the port bow anchor and decided to utilize the "dogging" procedure, he did not stop in midstream and call Rose for permission to use the "dogging" method. In fact, Rose did not know there had been any trouble with the anchor until sometime on December 21, when the rupture was located. The Court finds that it would have been impractical to require Southon to call in for permission to use a particular procedure to retrieve an anchor he was in the process of having problems with, when it was just such an instantaneous decision that Williams-McWilliams expected a man with 10 years' experience to make on his own. It has already been determined, however, that under the circumstances which existed that day, it was negligent of Captain Southon to use the "dogging" method, and that such negligence was the sole proximate cause of the pipeline rupture. See, Original Finding of Fact No. 29, and Conclusions of Law, p. 17, par. 3-5.

15.

The Barge W-701 was built in 1960 by Avondale Shipyards for approximately $125,000. It measures 180 ft. by 60 ft. by 12 ft., and is outfitted with a steam-powered World War II vintage crane. Carl Hicks testified at the trial on damages as to each item of equipment added to the original barge since 1960, and by 1969 the barge had a total acquisition cost value (barge and equipment) of $350,250.00. Carl Hicks was the Williams-McWilliams executive in charge of getting hull insurance on its vessels, and he testified that between July, 1963, and July, 1968, the W-701 was insured for $350,000.00. From July, 1968, until July, 1969, it was insured for $400,000.00 and from July, 1969, until July,

1972, the barge was insured for $500,000.00 Hicks testified that he always tried to insure the Williams-McWilliams vessels for their approximate replacement cost in kind.

16.

[6] In addition to Carl Hicks, the parties presented three expert witnesses on the issue of the value of the Barge W-701 in 1969.[1] Williams-McWilliams submitted the depositions of James Brooks and Andrew Allan, while McDermott submitted the deposition testimony of Richard Patton.

17.

James Brooks is the owner, manager and sole employee of Houston Barge and Boat Sales, which is a marine selling and chartering broker. He is also President of Houston Barge Rental Corporation, which owns either in whole or in part an interest in 12 rental deck barges. Brooks has been in the barge sales and rental business for approximately twenty years and has a good

[1] Although it is difficult to weigh the relative credibility of a witness from deposition testimony, the parties elected to so present all three experts. The Court, however, has tried to judge their credibility as best it can by viewing their testimony in light of what appear to be obvious tactical maneuvers on the part of those concerned.

First, the Court notes that the plaintiffs are seeking over $1 million worth of damages. The defendants, Sun and McDermott, have an uncontested direct action against only $500,000.00 worth of defendant Williams-McWilliams' insurance. Williams-McWilliams is seeking to limit its personal liability to the value of the barge, which it conveniently contends is less than $500,000.00. If limitation to that amount is allowed, and if Sun and McDermott cannot get a direct action against the $5,000,000.00 umbrella policy, then they will have to pay the remaining damages to SLAM in indemnity. Accordingly, Sun and McDermott conveniently argue that the value of the barge is over $1 million dollars. The significance of the Court's own observations will become clearer as the deposition testimony is discussed, infra.

working knowledge of the fluctuations in market value of derrick barges during that time.

Brooks was deposed on February 23, 1978, and had only seen the W-701 for the first time that morning. However, he had previously been furnished with the specifications of the barge, and the acquisition cost of each item of equipment it contained, in the form of a letter to him by counsel for Williams-McWilliams. Brooks was quite candid in his deposition that he knew full well that Williams-McWilliams, or at least their attorneys, were hoping to get the 1969 value of the barge within the limits of their available insurance. However, Brooks proceeded, with that knowledge, to evaluate the W-701 strictly on the basis of the specifications and acquisition costs which were provided to him, as well as his own knowledge and experience with market values and contemporaneous sales of similar barges in 1969. Brooks concluded that a fair estimate of the 1969 value of the Barge W-701 would be $450,000.00.

18.

Andrew Allan was a naval architect with a degree from the College of Technology in Belfast, Ireland. He, too, had only seen the W-701 for the first time on the morning of his deposition, which was also taken on February 23, 1978, but he, too, had been provided with the same list of specifications and acquisition costs that counsel for Williams-McWilliams had supplied to Brooks. It should be noted that these figures were the same ones to which Carl Hicks of Williams-McWilliams testified live at the trial.

Allan used these figures as a guideline only. For example, although he knew that the crew quarters on the W-701 had actually cost Williams-McWilliams only

$81,000.00, Allan used a 1969 replacement cost of $100,000.00, and depreciated that figure to $82,500.00. He knew that the 1940 steam crane's actual cost had been only $7,500.00, but he gave it a 1969 market value of $30,000.00. After similar assessments of each portion of the barge, and a visual assessment of the barge itself, Allan estimated that the W-701 had a 1969 new replacement cost of $580,000.00, which would give it a market value of $450,000.00.

19.

Richard Patton was also deposed on February 23, 1978. Although McDermott made much ado about the fact that Brooks and Allan had only just seen the W-701 that morning, Patton had only seen it once himself, and then only two months earlier on December 22, 1977. Additionally, Patton had no idea what items of equipment might have been on the barge in 1969, or what the acquisition cost of any item might have been.

Patton was employed by Matthews-Daniels Company, a marine surveying company. Although he testified that he surveyed as many as 50 vessels a year, he had only been a surveyor for three years, with two more years as a surveyor trainee with Hull and Cargo Surveyors in Houston. Patton is a 1970 graduate of Texas A & M, with one semester of naval architecture. In contrast to Allan's testimony, Patton valued the crew quarters of the W-701 at $200,000.00, undiscounted. He valued the World War II steam crane at $150,000.00 by comparing it to a diesel-powered crane on the barge RANGER, which crane sold in 1970 for $127,000.00. A January 7, 1970 survey of the RANGER, which measures 175 ft. by 60 ft. by 9.5 ft., gave the RANGER a market value of $300,000.00, with replacement value of $460,000.00. Patton also testified that the 1970 value of the barge MERRIMAC was $650,000.00, and that the 1969 value of yet

another barge, similar to the W-701, was $450,000.00.

Nevertheless, Patton gave as a low estimate of the 1969 value of the Barge W-701 the figure of $1,310,000.00.

20.

After reading all three depositions, reviewing Carl Hicks' trial testimony, and weighing the relative candor, experience and methodology of Brooks, Allan, and Patton, the Court finds the 1969 value of the Barge W-701 to be $450,000.00.

Although the Court is aware of the possible motivations lurking behind the efforts of the parties, it feels that Brooks especially was very candid in his own assessment of those motives, and that he and the others tried their best to come to grips with a fair hindsight estimate of the barge's value in 1969. For whatever reason, Brooks and Allan had more pertinent information at their disposal than did Patton, and their methodology, combined with their training and experience, created a sound estimate in the Court's opinion. That soundness is buttresses by the fact that Patton acknowledged contemporaneous values of three similar barges with a range of from $300,000.00 to $650,000.00. This leads one logically to an average value for a barge of the type, and equipped, as the W-701 of about $450,000.00. The leap from that figure to one of $1,310,000.00, as a *low* estimate, cannot be reconciled in the mind of the Court, and it therefore accepts $450,000.00 as the most realistic figure under the circumstances.

21.

Williams-McWilliams had three policies of insurance

in effect which would have provided coverage for the liability which it incurred as a result of the rupture of the Marathon pipeline on December 20, 1969. Employers' Liability Assurance Corporation issued a primary policy. No. CL EG 9116-125, directly to Williams-McWilliams in Louisiana. That policy was in full force and effect on December 20, 1969, and had limits of $100,000.00. Employers' Surplus Lines Insurance Company issued its excess policy No. S-11-00980 directly to Williams-McWilliams in Louisiana. That policy had limits of $400,000.00. There was also in effect an umbrella excess policy which had Williams-McWilliams, as a division of Paramount Warrior, Inc., listed as an additional insured. Umbrella Policy No. EG 8559-001 of Employers' Liability Assurance Corporation was, however, issued in London and delivered directly to Zapata Norness in Houston, Texas, which was the parent company of Paramount Warrior, Inc. That policy had limits of $5,000,000.00, and covered literally dozens of Zapata's many divisions and subsidiaries all over the world.

22.

Richard J. Ford, a Vice President and Treasurer of Williams-McWilliams, testified by deposition that he was in charge of getting primary and first excess liability insurance for Williams-McWilliams, which operated solely out of Louisiana in the offshore oil industry. Thus, any policies which Ford secured named Williams-McWilliams as the sole insured under the policy, and the policy was delivered to Williams-McWilliams directly in Louisiana. However, the parent company, Zapata Norness, was in charge of umbrella excess insurance to cover all of Zapata's operations world-wide. These policies would list Zapata as the named insured with dozens of subsidiaries and divisions listed as additional

insureds. Such umbrella policies were delivered directly to Zapata at its Houston, Texas office.

23.

Umbrella Policy No. EG 8559-001 was issued from London, England, and delivered to the named insured, Zapata Norness, in Houston, Texas. Mr. R. W. Hover, Treasurer of Paramount Warrior in Houston, mailed to Richard Ford of Williams-McWilliams a recapitulation of the terms and coverages of the umbrella policy so that Ford would know the extent of the coverage it provided for Williams-McWilliams as an additional insured. Ford never saw Policy No. EG 8559-001.

24.

In keeping with its contractual obligations to McDermott, Williams-McWilliams would have its insurance agents sent to McDermott notices of Williams-McWilliams' insurance coverage at any given time. For the three policies at issue here, the following certificates, or advices, of insurance were issued:

On April 15, 1969, C. A. Sporl & Co., Inc., issued a certificate of insurance to McDermott advising them that Employers' Liability Assurance Corporation had issued Policy No. CL EG 9116-125 to Williams-McWilliams with limits of $100,000.00. See, Exhibit McDermott No. 10. Also on April 15, 1969, C. A. Sporl & Co., Inc., issued a certificate of insurance to McDermott which advised them that Employers' Surplus Lines Insurance Company had issued Policy No. S11-00980 to Williams-McWilliams, with excess property damage liability limits of $400,000.00 over Policy No. CL-EG-9116-125. See, Exhibit McDermott No. 13. On November 10, 1969, Johnson & Higgins of Louisiana, Inc. sent McDermott a document entitled "Advice of Insurance" which in-

formed McDermott that insurance had been issued by Employers' Liability Assurance Corporation covering "Williams-McWilliams Company Division of Paramount Warrior, Inc." This "Advice of Insurance" described the umbrella liability coverage of Policy No. EG 8559-001, which had limits of $5,000,000.00. The "Advice" further stated:

This Advice of Insurance neither affirmatively nor negatively amends, extends, or alters the coverage afforded by the policy issued by the company and referenced above.

See, Exhibit McDermott No. 15.

25.

In Richard Ford's deposition he states that before Zapata Norness acquired Williams-McWilliams, the Williams company got all of its insurance through Louisiana brokers C. A. Sporl & Co., Inc. After the corporate acquisition, Zapata decided to continue to obtain Williams-McWilliams' primary and first excess coverage through C. A. Sporl, but the Houston parent obtained umbrella coverage, not only for Williams-McWilliams, but for all of its divisions and subsidiaries, elsewhere. As of his March 6, 1978 deposition, Ford testified that he still dealt with C. A. Sporl for the primary insurance, while Zapata controlled the remainder from Houston. See, Ford deposition p.19.

26.

With respect to the damages claimed by SLAM, the testimony at trial was that their average cost of borrowing money since 1969 to offset these damages was 13.4%. However, there was no testimony that any money was actually borrowed by SLAM in order to finance the repairs to the Marathon pipeline.

CONCLUSIONS OF LAW

For the reasons stated in the above findings of fact, the Court finds that as a matter of law the entire amount of damages claimed by SLAM, i.e., $1,116,234.62, is recoverable. To the extent that Sun is a 10% owner of the Marathon pipeline they are entitled to either recover 10% of those damages or to receive a 10% credit toward whatever amount they may be determined to owe SLAM in contractual indemnity.

Having determined that the full amount of the damages asked for are recoverable, the Court must now turn to the far more difficult task of unraveling who is going to pay what to whom. We shall commence with the issue of Limitation of Liability.

LIMITATION

Under this Court's original liability decision, Williams-McWilliams was found to be the sole tort-feasor by virtue of Captain Southon's negligence in "dogging" the anchor of the Barge W-701 under the circumstances known to him on December 20, 1969. Although each was found to non-negligent, Sun was determined to owe contractual indemnity to SLAM, and McDermott to owe contractual indemnity to Sun. Sun and McDermott were then determined to be entitled to maritime tort indemnity from Williams-McWilliams. This means that, ideally, SLAM would recover all of its damages from Williams-McWilliams (with 10% going to Sun), and Sun and McDermott would pay nothing. However, if Williams-McWilliams were found to be entitled to limit its liability to the value of the Barge W-701, and that value was determined to be less than the full amount of the damages, then the indemnity liability of Sun and McDermott would be activated.

Williams-McWilliams has pled the defense of Limitation of Liability, 46 U.S.C. 181, et seq., in its answers to the original complaint and to the cross-claims of Sun and McDermott. Under 46 U.S.C. 183 a vessel owner is entitled to limit its liability for any loss incurred without its privity or knowledge to the value of the vessel and its pending freight at the time of the accident in question. Under 46 U.S.C. 185 the vessel owner may file a petition for limitation of liability within six months of a written notice of claim, and, when filing such a petition, he must either put the vessel in trust or file security with the Court in the amount of the vessel's value for the benefit of the claimants. Section 185 provides that, "Upon compliance with the requirements of this section all claims and proceedings against the owner . . . shall cease."

The first wave of attack upon Williams-McWilliams' claim to limitation is that since it did not file § 185 petition within six months of SLAM's notice of claim dated December 22, 1969, and since it failed to post the requisite security, it has no right to plead limitation at all. This attack is coupled with the argument that the right to limit under § 183 can only be invoked by means of a § 185 petition, and that it cannot be raised as a defense in an answer. These arguments are without merit for the following reasons.

[7] The law is now well settled that that right to limit under § 183 may be pled as a defense in one's answer, and that a vessel owner need not file a § 185 petition. *Odegard v. E. Quist, Inc.*, 199 F.Supp. 449 (E.D. N.Y. 1961); *Baham v. Atlantic, Gulf and Pacific Company*, 333 F.Supp. 680 (E.D.Pa. 1971); *Blunk v. Wilson Line of Washington, Inc.*, 341 F.Supp. 1345 (N.D.Ohio 1972). Furthermore, neither the six months period for filing, nor the requirement for bond or security of a § 185 peti-

tion applies to a § 183 defense raised by way of answer. *Federazione Italiana v. Mandask Compania,* 223 F.Supp. 206 (S.D.N.Y.1963), aff'd. in part, rev'd. in part (on other grounds) 342 F.2d 215 (2d Cir. 1965); Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975), p. 855. [2]

[8] The next argument is that by pleading limitation in separate answers to the cross-claims and the main demand, Williams-McWilliams has created multiple limitation funds. The 1949 decision of *The West Point,* 83 F.Supp. 680 (E.D.Va.) is cited as authority for this contention.

The decision in The West Point was reached with only a cursory analysis, at best, of the Limitation Act, and did not resurface in reported decisions for nearly twenty-five years. After a much more thorough review of both the Act and its legislative history, the multiple fund result of *The West Point* was soundly rejected in the 1972 decision of *Blunk v. Wilson Line of Washington, Inc., supra.* The *Blunk* decision has been cited with approval by the commentators. See, Gilmore & Black, supra, at pp. 858-859; and Volk & Colb, *Limitation of Liability,* 51 Tul.L.Rev. 953, 977-978 (June, 1977). In *Blunk* the court was faced with a consolidation of some forty complaints by schoolchildren who had been passengers on an excursion vessel which had run aground. The vessel owner elected to seek limitation by

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[2] SLAM cited the decision in *Cincinnati Gas and Electric v. Abel,* 533 F.2d 1001 (6th Cir. 1976), cert. den. 429 U.S. 858, 97 S.Ct. 158, 50 L.Ed.2d 136 for the proposition that limitation may only be raised by means of a timely filed § 185 petition; however, a close reading of that decision shows that it was in fact dealing with the special problems which arise when limitation is raised by an answer to a state court proceeding. For a complete discussion of these problems, see Volk & Cobb, *Limitation of Liability,* 51 Tul.L.Rev. 953 (June 1977), at pp. 974-977.

means of answer, and the plaintiffs therefore argued that this created forty different limitation funds, citing *The West Point.* The *Blunk* court rejected the argument after a thorough analysis of the Limitation Act, feeling that such an interpretation would render 46 U.S.C. 183 meaningless. This Court agrees, and therefore holds that should limitation be granted here, there will be only one limitation fund for both the cross-claims and the main demand.[3]

[9] As a final attempt to nip limitation in the bud, McDermott asserts that, in any event, Williams-McWilliams cannot limit as to it because of the so-called "personal contract" doctrine. Pretermitting whatever merits this argument might otherwise have had, the Court notes that it cannot be applied in the instant case because McDermott's right to recover in indemnity from Williams-McWilliams is based on maritime tort indemnity, and not on any beach of a personal contract with McDermott See, Original Conslusions of Law, pp. 20-21; and generally, Gilmore & Black, supra, at pp. 904-905.

(10] This brings us to the question of whether Williams-McWilliams had privity with or knowledge of Captain Southon's negligence in "dogging" the anchors of the W-701 on December 20, 1969, for it is only if Williams-McWilliams can prove itself innocent of such privity or knowledge that it is entitled to the benefit of limited liability under 46 U.S.C. 183. See generally this Court's recent opinion in *Matter of State of La., Dept. of Highways,* 455 F.Supp. 272, 281-282 (E.D.La.1978).

[3] Although this interpretation seems to create no advantage for a vessel owner in filing a § 185 petition with its six months' filing limit and requirement of security, the obvious procedural advantages which § 185 provides for concursus proceedings are well illustrated by the *Cincinnati Gas* case, supra.

It must be remembered that the original decision of this Court found the sole proximate cause of the pipeline rupture to have been Southon's negligence in using a particular method of anchor retrieval under the circumstances with which he was faced on December 20, 1969. The Court found no unseaworthiness and no defective barge equipment. Therefore, to the extent that the parties make arguments against limitation on the basis of either unseaworthiness or defective barge equipment, those arguments are rejected.

[11] However, the parties make the additional argument that Captain Southon was not merely negligent, he was incompetent since he lacked formal training in either navigation or anchor handling. From there, the parties argue that William Rose had personal knowledge of Southon's incompetence, which knowledge is imputable to the corporate vessel owner. *The Linseed King*, 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903 (1932); *Avera v. Florida Towing Corp.*, 322 F.2d 155 (5th Cir. 1963). To the contrary, on the facts found above it is clear that Captain Southon was not incompetent but merely negligent.

Although it is true there was no formal training provided to Southon in either navigation or anchor handling, the on-the-job training which was provided to him created an obviously capable man with an excellent reputation, whose record reflected only one other such instance of pipeline damage in ten years on the job. As for navigation training, Southon had no need to be trained in navigation per se since the barge was always towed by a tugboat whose captain was in charge of navigation. On the present record the Court feels this case clearly falls within the holding of the Fifth Circuit in *Farrell Lines v. Jones*, 530 F.2d 7 (1976), where the Court states at p. 12:

> In sum, neither the absence of an additional watch officer nor the location of the rudder angle indicator involved negligence or rendered the vessel unseaworthy. Although the presence of an additional officer or the relocation of the indicator might have reduced the possibility of collision, that is not the standard by which we are to determine whether *Farrell* is entitled to limitation. Rather, we must ask whether the procedures and equipment utilized rendered the vessel *reasonably* fit under the circumstances. Here, we conclude . . . . that the vessel as equipped was reaspmably capable of performing the intended mission if properly operated. The accident resulted from lack of care and failure to exercise proper procedures by those on the bridge. For this *Farrell* is liable, but it is also entitled to limit. (citations omitted).

Here, too, Southon's negligence in "dogging" the anchor may be something for which Williams-McWilliams is liable, but for which it is also entitled to limit. The Court has already concluded that the 1969 value of the W-701 is $450,000.00. Since there was no pending freight within the meaning of 46 U.S.C. 183, that amount shall constitute the limitation fund.

INSURANCE

[12-14] The foregoing analysis now brings us to the question of the insurance proceeds covering the liability of Williams-McWilliams. Insurance proceeds as such are not subject to the owner's right to limit, and therefore not technically a part of the limitation fund, *The City of Norwich,* 118 U.S. 468, 6 S.Ct. 1150, 30 L.Ed. 134 (1886).

However, the vessel owner does have an interest in not having the proceeds exhausted by the claimants before the extent of his own liability can be covered by them, *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954). Therefore, the formula has been established whereby once the amount of the limitation fund has been determined, the insurer pays the proceeds into the fund up to the maximum limit of the fund, the claimants are paid their pro rata share of the fund, and they then proceed directly against the remainder of the insurance proceeds for the remainder of their claims. *Maryland Casualty Co. v. Cushing, ibid.* This analysis, of course, assumes that a claimant has a right of direct action against the vessel owner's insurer under a statute such as L.R.S. 22:655.

> L.R.S. 22:655 provides in part:
> . . . .The injured person or his or her survivors of heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido. . . .This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not. . . .provided the accident or injury occurred within the State of Louisiana. . . . .

The cited language has been construed by the Louisiana Supreme Court to mean that in order for an injured third party to sue a tort-feasor's insurer directly, *either* the accident or injury must have occurred in Louisiana *or* the policy must have been written or delivered in Louisiana. *Webb v. Zurich Insurance Co.*, 251 La. 558, 205 So.2d

398 (1967). In the present case it is uncontested that the rupture to the Marathon pipeline occurred offshore beyond the territorial limits of Louisiana. It is further uncontested by the defendant insurers that both the primary and the first layer excess policies issued to Williams-McWilliams are covered by L.R.S. 22:655 because each was delivered to Williams-McWilliams in Louisiana. However, defendant Employers' Liability Assurance Corporation maintains that its Umbrella Policy No. EG 8559-001 does not fall within the ambit of that statute because it was neither written nor delivered in Louisiana. The insurer justifiably takes this position because the policy was written in London and delivered in Houston, Texas. The following counter arguments are made by SLAM, Sun and McDermott.

First, it is argued that since the unbrella policy by its terms is a continuation of the first two policies, it was thereby "constructively delivered" in Louisiana. No legal authority was cited for this proposition and the Court can find none; therefore, it is rejected.

Second, it is argued that countersignature of the policy under Louisiana law has made the policy a Louisiana contract covering a business, Williams-McWilliams, which has more than minimum contacts with Louisiana, and therefore the Direct Action Statute should apply to the umbrella policy. However, the Louisiana courts have consistently held that the minumum contacts necessary to hold a foreign insurer liable to personal jurisdiction are not the same as the contacts required for a right of direct action under L.R.S. 22:655. Unless the policy in question was written or delivered in Louisiana, or the accident occurred here, there is *no* right of direct action no matter how many other Louisiana statutes the insurer has complied with, or how many

other contacts it may have here. *Esteve v. Allstate Ins. Co.*, 351 So.2d 117 (La.1977); *Easterly v. Dynamic Enterprises, Inc.*, 334 So.2d 467 (La. 1st Cir. 1976); *Cambre v. St. Paul Fire & Marine Ins. Co.*, 331 So.2d 585, 588-589 (La. 1st Cir. 1976), writ refused 334 So.2d 434, 435; *Kirchman v. Mikula*, 258 So.2d 701, 703 (La. 3d Cir. 1972).

Third, it is argued that the certificates, or advices, of insurance issued to McDermott and evidenced by McDermott Exhibits Nos. 10, 13 and 15 are conclusive proof that all three policies were actually delivered to Williams McWilliams in Louisiana, and that the insurer is now estopped from denying such delivery. In making this argument the parties rely on the case of *Sassoni v. Savoie*, 327 F.Supp. 474 (E.D.La. 1971) which held that where a certificate of insurance was delivered in Louisiana then L.R.S. 22:655 provided a direct action against the insurer even though the accident occurred offshore. The problem with this argument is that the *Sassoni* case was apparently dealing with a "binder" of insurance delivered to the insured, Leslie Savoie, in Cut Off, Louisiana (see 327 F.Supp. at 475-476), whereas here we are presented with "advices" confirming the existence of insurance to a third-party, McDermott, and not delivered to the insured. (McDermott Exhibits Nos. 10, 13 and 15 show the advices on insurance were delivered to McDermott in Louisiana.) Hence, this final argument is also without merit.

Since Umbrella Policy No. EG 8559-001 was neither written nor delivered in Louisiana, nor did the accident occur here, SLAM, Sun and McDermott have no right to a direct action under L.R.S. 22:655 against Employers' Liability Assurance Corporation, and it is therefore entitled to judgment in its favor, dismissing the demands of those parties.

PRE-JUDGMENT INTEREST

[15] SLAM has sought to have its damages award against the defendants herein subject to pre-judgment interest at a rate of 13.4%, to run from the date of the loss, December 20, 1969. The prevailing legal rate of interest is 7%; however, at the trial on damages, Don Peppers testified that 13.4% was the average cost of borrowing money for the SLAM group from December, 1969, to February, 1978, when the damage issues were tried. SLAM therefore argues that they are entitled to recover their damages at this greater interest rate under the holding of *Complaint of M/V Vulcan*, 533 F.2d 489 (5th Cir. 1977). The Court disagrees. Although it is true that the *Vulcan* decision allowed an award of interest greater than the prevailing legal rate in order to reflect the complainant's real cost of borrowing money, the SLAM group offered no evidence at trial that any money was actually borrowed in order to make the necessary repairs to the Marathon pipeline. Accordingly, the Court will award interest only at a rate of 7%. Since it is the rule, rather than the exception, that pre-judgment interest is awarded in maritime cases, to run from the date of the loss, *Complaint of M/V Vulcan, supra*, the Court will award damages here at 7% interest to run from December 20, 1969.

As a final note on the indemnity claims of Sun and McDermott, each has submitted affidavits of counsel as to the amount of attorney fees, costs and expenses that were incurred as a result of this litigation. These affidavits were uncontested and the Court will therefore use the figures contained therein in making its judgment.

[16] McDermott made a final effort to escape liability

to Sun in indemnity by quoting at p. 24 of its post-trial brief language to the effect that any indemnity obligation incurred by McDermott on account of its own negligence would be limited to the amount of its insurance. McDermott therefore argues that since it was held to be non-negligent, it owes Sun nothing, and in any event no more than its insurance limits. The Court does not agree. First, the language cited comes from McDermott's rental rate agreement, and not from its contract with Sun, Clauses 11 and 15 of which were relied on in the original decision on liability. See, Original Finding of Fact No. 7. Second, clause 11 of the contract requires indemnity from McDermott whether it is negligent or not, unless excepted by clause 15. See, Original Conclusions of Law, p. 19. The Court has found herein that McDermott is not liable under clause 15 to indemnify Sun for any expenses related to lost overhead by SLAM, and the judgment will so reflect. See, Finding of Fact No. 8. Therefore, McDermott is entitled to no other limitations.

Accordingly, IT IS HEREBY ORDERED that JUDGMENT be entered herein in accordance with this opinion.

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2089

SIGNAL OIL AND GAS COMPANY, ET AL.,
Plaintiffs-Appellees,

v.

THE BARGE W-701, ET AL.,
Defendants-Appellees,

v.

WILLIAMS-McWILLIAMS COMPANY,
Defendant-Appellant
Cross Appellee,

v.

J. RAY McDERMOTT & COMPANY, INC.,
Defendant-Appellee
Cross Appellant.

Appeals from the United States District Court
for the Eastern District of Louisiana

(November 29, 1976)

Before AINSWORTH and CLARK, Circuit Judges, and HUGHES, District Judge.

PER CURIAM:

The Court has been furnished with voluminous and detailed briefs by the numerous parties to this proceeding. Additionally, lengthy oral argument has occurred at which counsel have been permitted a full opportunity to present their respective views. We are convinced, after a most careful review of the briefs and pertinent portions of the record, as well as consideration of the case in oral argument, that only issues of fact are involved.

There are, of course, serious disputes as to the facts but these have been resolved by the trier of fact, the district judge. In Chaney v. City of Galveston, 5 Cir., 1966, 368 F.2d 774, we said that in matters of this kind, which are largely based upon consideration of the district court's findings of fact, we do not retry the case in the appellate court. We determine only whether the findings pass muster under the clearly erroneous rule, Fed. R. Civ. P. 52(a). Further, in *Chaney*, we said that findings of the district court are not lightly to be set aside for the appellate court is not a trier of facts and does not substitute its own judgment for that of the trial court. District Judge Gordon's findings of fact and conclusions of law are meticulously detailed and have found the facts adversely to the contentions of appellant. We are not persuaded that they are clearly erroneous. To the contrary, we believe they are correct. No useful purpose can be served, therefore, by a lengthy opinion by this Court since we are firmly convinced that issues of fact are primarily involved and that the district judge's findings correctly determined these fact issues.

Since there is no definite and firm conviction that a mistake has been committed, we affirm the judgment of

the lower court on the basis of the opinion of the district court. *See Chaney, supra,* 368 F.2d at 776.

AFFIRMED.

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 70-3491 SECTION "I"

SIGNAL OIL & GAS COMPANY, ET AL

versus

THE BARGE W-701, et al

INTERLOCUTORY JUDGMENT

The Court having made Findings of Fact and Conclusions of Law on December 13, 1974, and having denied a motion to amend same, and having been requested pursuant to 28 USC 1292(3) to enter an interlocutory judgment; it is hereby

ORDERED, ADJUDGED AND DECREED that Signal Oil and Gas Company, The Louisiana Land and Exploration Company, Amerada Hess Corporation, Marathon Oil Company, Sun Oil Company and Aquitaine Oil Corporation recover of and from Williams-McWilliams Company, Inc. and the Barge W-701, *in rem*, the amount of its damages as to be determined at a later trial before this Court; and, it is further

ORDERED, ADJUDGED AND DECREED that Signal Oil and Gas Company, The Louisiana Land and Exploration Company, Amerada Hess Corporation and Marathon Oil Company are entitled to indemnity from Sun Oil Company and Aquitaine Oil Corporation; and it is further

ORDERED, ADJUDGED AND DECREED that the matter of Sun Oil Company's and Aquitaine Oil Corporation's right to indemnity from J. Ray McDermott & Co., Inc. under the provisions of the contract between them be reserved until the future trial on the issue of damages; and it is further

ORDERED, ADJUDGED AND DECREED that to whatever extent Sun Oil Company, Aquitaine Oil Corporation, and J. Ray McDermott & Co., Inc. are required to respond under their respective indemnity obligations they are entitled to recover the amount of said indemnity from Williams-McWilliams Company, Inc.; and, it is further

ORDERED, ADJUDGED AND DECREED that, subject to the foregoing judgment, all claims, cross-claims and third-party claims against Wine Island Pass Towing Company, Inc., and the Tug CHARLES J. CENAC, *in rem*, and their respective underwriters be and the same hereby are DISMISSED; and, it is further

ORDERED that if an appeal is not filed within thirty days of the entry of this interlocutory judgment that on application of the plaintiff a trial date will be set for the hearing on damages, but if a notice of appeal is filed within thirty days from the entry of interlocutory decree that this part of the interlocutory decree be and the same hereby is stayed, until the Court of Appeal for the Fifth Circuit hands down its opinion and judgment herein.

New Orleans, Louisiana, in the Eastern District of Louisiana, this 28th day of March, 1975.

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JACK M. GORDON

United States District Judge

Appendix H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 70-3491 SECTION "I"

SIGNAL OIL & GAS COMPANY, ET AL

VS.

THE BARGE W-701, ET AL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiffs, Signal Oil & Gas Company, Louisiana Land and Exploration Company, Amerada Hess Corporation and Marathon Oil Company (hereinafter referred to as "SLAM") initiated this admiralty action to recover damages sutained by a pipeline in which the SLAM group owns a 90% interest. In the plaintiffs' first claim the defendants are Sun Oil Company, Aquitaine Oil Corporation, J. Ray McDermott and Company, Inc., Williams-McWilliams Company, Inc., the Barge W-701, *in rem*, the Wine Island Pass Towing Company, Inc., the Tug CHARLES J. CENAC, *in rem*, and various insurers of the defendants. The plaintiff SLAM alleges in the first claim that the defendants negligently ruptured a submerged SLAM pipeline by raising an anchor in an improper manner. In a second claim the plaintiff SLAM seeks contractual indemnity for damage to the pipeline from the defendants Sun Oil Company and the Aquitaine Oil Corporation.

Besides denying the allegations of negligence and responsibility, each defendant, if found liable, claims legal recourse against one or more of the other defend-

ants. Therefore, to simplify matters, the defendants stipulated in the Pre-Trial Order that the Court may render judgment as if each defendant had cross-claimed against all other defendants, including the Barge W-701 and the Tug CHARLES J. CENAC, *in rem*.

While cast in the major role of defendants, Sun Oil Company and Aquitaine Oil Corporation (hereinafter referred to as "Sun") are also "plaintiffs" in this case. Sun owns a 10% interest in the damaged pipeline and has cross-claimed against the other defendants to recover for damages to their interest in the pipeline.

The issue of liability was tried to the Court on June 4, 5 and 6, 1973. At the close of the plaintiffs' case, the motion for an involuntary dismissal of the plaintiffs' claims, all cross-claims, and all third-party claims against the Wine Island Towing Company, Inc. and the Tug CHARLES J. CENAC, *in rem*, was granted. The Court reserved decision on the motions for involuntary dismissal of the defendants Sun and J. Ray McDermott and Company, Inc. (hereinafter referred to as "McDermott"). After considering the testimony of the witnesses, the depositions which were introduced into evidence, the exhibits entered into evidence and the post-trial briefs submitted by the parties, the Court enters the following findings of fact and conclusions of law.

Findings of Fact

1.

Signal Oil and Gas Company, Louisiana Land and Exploration Company, Amerada Hess Corporation and Marathon Oil Company (SLAM) agreed to work together to develop an offshore oil field. Pursuant to that agree-

ment, Signal Oil and Gas Company (hereinafter referred to as "Signal"), as a member of and on behalf of the SLAM group, operated in 1969 five, fixed, production platforms in an oil field located in the contiguous Main Pass Blocks 305 and 306. Main Pass Blocks 305 and 306 are located in the Gulf of Mexico off the coast of the State of Louisiana.

2.

Signal Platform A was one of the five permanent platforms located in Main Pass Blocks 305 and 306. The other four platforms were referred to as Signal Platforms B, C, D, and E. Signal Platform A was a rectangular platform which measured approximately 138 feet in length and 72 feet in width. Signal Platform A stood in waters which had a depth of about 250 feet and the floor of the platform was about 65 feet above the surface of the water. This rectangular platform was positioned with a long side facing the northeast, a short side facing the northwest and the corner formed by these two sides pointing north. That corner will be denominated as the northeast corner of Signal Platform A.

The corners and legs of the platform will be identified by an imaginary bisection of the platform into northern and southern portions. The two corners and the legs on each corner in each division then will be denominated as the eastern or western corner or leg of that portion of the platform.

3.

Signal Platform A was the gathering point for oil produced in the Main Pass Blocks 305 and 306 oil field. The other four Signal Platforms, B, C, D and E, each were connected to Signal Platform A by separate submerged pipelines. Signal Platform A might be described as the hub of the system; the spokes being the four pipelines

from each of the other four platforms.

4.

The SLAM group initially owned 100% of a 12¾ inch pipeline (hereinafter referred to as the "Marathon pipeline"). The Marathon pipeline was built to receive the oil which was gathered at Signal Platform A and to transport that oil to the Getty Oil Company Terminal in Venice, Louisiana. At the time in question, crude oil pumped from Signal Platform A had not reached the onshore facility, but had progressed to a point about 200,000 feet from Signal Platform A. Ahead of the oil, the Marathon pipeline contained water. The estimated length of the Marathon pipeline was 54 miles. The pipeline was constructed with steel pipe, the walls of which had a width of 1/2 to 3/8 inches. The steel pipe was covered with a tar-like mastic coating which offered corrosion prevention and maximized the life of the cathodic protection. The pipe and mastic coating were encased in concrete which had a thickness of 1 to 1¼ inches. The concrete provided the pipeline with a negative buoyancy. The negative buoyancy prevented the pipeline from floating and possibly shifting its location. The Marathon pipeline was connected to a riser on the northwest leg of Signal Platform A. The pipeline proceeded in a northwesterly direction from Signal Platform A and lay generally in line with the southwest side of the platform. At a point about 500 to 600 feet from Signal Platform A there existed only a minimal discrepancy between the "as built" and "proposed" location of the Marathon pipeline. It was established that at that point the "as built" pipeline location was thirteen to thirty feet to the east of the "proposed" pipeline site. At such point the Marathon pipeline lay on the bed of the Gulf of Mexico in waters which had a depth of 250 feet. The public notice issued on May 6, 1969, and June 13, 1969, by the Depart-

ment of the Army's Corps of Engineers stated that the Marathon pipeline would be laid on the floor of the Gulf of Mexico in water depths exceeding 200 feet. This public notice was given after SLAM requested a permit to construct the Marathon pipeline. The Department of the Army approved SLAM's request and issued a permit on July 1, 1969.

At that time the Department of Interior required that all pipelines six inches or larger in diameter be buried a minimum of three feet below the Gulf bottom. SLAM requested a waiver of this requirement for the portion of Marathon pipeline between Signal Platform A and station 555+00 in Main Pass Block 143. That segment of the pipeline includes the portion of the Marathon pipeline 500 to 600 feet from Signal Platform A. The Department of the Interior waived the burial requirement on July 3, 1969.

5.

During this same time period Sun owned and operated a fixed oil producing platform (hereinafter referred to as "Sun Platform 1"). Sun Platform 1 was located in Main Pass Block 293. Main Pass Block 293 was adjacent to Main Pass Blocks 305 and 306. The southern border of Block formed a part of the northern boundary of Blocks 305 and 306.

6.

For purposes of transporting to shore the petroleum produced by Sun Platform 1, Sun negotiated and consummated an agreement with the SLAM group. Pursuant to the agreement, Sun purchased a 10% interest in SLAM's Marathon pipeline. SLAM agreed to allow Sun to connect by pipeline the Sun Platform 1 and the Marathon pipeline at Signal Platform A. Specifically,

Sun was permitted to utilize one riser on Signal Platform A to tie its pipeline into the Marathon pipeline. A riser is a section of pipe which runs up a leg of the platform and links a submerged pipeline to a connection on the platform. It was envisioned that oil from the Sun Platform 1 would run through the Sun pipeline to the riser on the northeast leg of the Signal Platform A. From that riser the oil would flow to pumping facilities on the Signal Platform A, down a riser on the northwest leg of the platform to the Marathon pipeline and then to shore.

The agreement between the SLAM group and Sun contained the following clause:

> . . . Furthermore, Second Parties [Sun] shall indemnify and hold First Parties [SLAM] harmless from and against any and all loss, cost, damage, expense, claims, actions and liability on account of any and all damage to and loss of or destruction of any property belonging to First Parties or to Third Parties and on account of injury to or death of any person or persons, including without limitation employees of Second Parties and First Parties, arising out of or in connection with the installation, repair and maintenance of said riser on Platform "A".

In November, 1969, Sun contracted for McDermott to construct a 6 inch pipeline from Sun Platform 1 in Main Pass Block 293 to Signal Platform A in Main Pass Block 305. The contract between Sun and McDermott contained the following provisions:

> 11. INDEMNITY: Contractor [McDermott] agrees to protect, indemnify and hold

Sun and its employees free and harmless from and against any and all claims, demands and causes of action of every kind and character from any cause whatsoever (except only as a result of the sole negligence of said indemnitees) by any party hereto, any party acquiring any interest hereunder, any of their agents and employees, and any third or other party whomsoever, or governmental agency, arising out of, incident to, or in connection with this agreement, or operations thereunder or breach of the terms hereof, including without limitation by enumeration all taxes, claims, debts, fines, penalties, forfeitures, patent infringements, loss of use, death, injury and damages to all persons and property, together with the amount of judgments, penalties, interest, court costs, legal and other fees and expenses in connection therewith.

15. Any provisions herein to the contrary notwithstanding, Contractor [McDermott] shall not be responsible or liable, as indemnitor or otherwise, for well damages or loss, reservoir damage or loss, loss of use of any equipment of Sun or any other party, or for any remote or consequential damages (as distinguished from direct and immediate damages).

8.

In December, 1969, McDermott was completing the installation and repair of the Sun Platform 1 in Main Pass Block 293. McDermott was employing the Barge W-701 to accomplish this task.

9.

The Barge W-701, owned by the defendant Williams-McWilliams Company, Inc. (hereinafter referred to as "Williams-McWilliams"), is about 180 feet long, 60 feet wide, and is equipped with a derrick. Williams-McWilliams furnished the W-701 with a crew consisting of a captain, mechanic, derrick operator, iron worker foreman and ten iron workers. The iron workers were doing installation work on the Sun Platform 1. The captain of the Barge W-701 at the time in question was Captain Norman Southon. The Barge W-701 was equipped with four 10,000 pound Navy Stockless Patent Anchors. The Barge W-701 also served as the staging area and primary living quarters for a group of divers who were employed by Dick Evans, Inc., a subsidiary of McDermott. The divers were performing tasks under water at Sun Platform 1.

On December 17, 1969, Mr. J. C. Guillory of J. C. Chance and Associates began marking with buoys the route of the proposed 6 inch pipeline from Sun Platform 1 to Signal Platform A and all existing lines running from Signal Platform A. J. C. Chance and Associates had been employed by the defendant Sun to accomplish this task. On December 17, 1969, the proposed 6 inch pipeline route had been marked using the surveying method of triangulation. Also on that day, the position of two existing lines running from one side of Signal Platform A had been located with the use of a shellfish and marked with buoys. On December 18, 1969, the shellfish was used to locate and mark with buoys three more existing lines, including the Marathon pipeline. The Marathon pipeline was marked with two buoys which could be identified by black and white flags on the buoys. The buoys were placed at points either 500 feet and 1000 feet or 1000 feet and 1500 feet from Signal

Platform A. Briefly, a shellfish is a device designed to locate submerged pipelines by detecting the metal in the pipe. The shellfish is lowered from a boat to the floor of the Gulf and a buoy, which is connected to the shellfish, marks its location. The shellfish is pulled along the ocean floor, and when it comes in contact with a pipeline, a signal is sent to the shellfish operator in the boat. The shellfish operator then advises the boat captain to back the boat next to the shellfish's buoy. There the marking buoy is dropped.

11.

On December 18, 1969, Mr. Al Browne, who was Sun's supervisor at Sun Platform 1, requested McDermott to transfer the Barge W-701, its crew and the Dick Evans divers, from their task at Sun Platform 1 to another job at Signal Platform A. Sun wanted the Barge W-701 to install on Signal Platform A connecting fixtures for the proposed Sun 6 inch pipeline. Some time during this period, Mr. Browne of Sun cam aboard the Barge W-701 and advised Captain Southon of the imminent move of the Barge W-701 to Signal Platform A. At this time Captain Southon called his superior at Williams-McWilliams to confirm the porpriety of moving to Signal Platform A.

12.

On December 18, 1969, Captain Southon went to Signal Platform A with Mr. Browne of Sun and Mr. William Greene of McDermott. While there a Signal employee pointed out to him the riser for the Marathon pipelines on the northwest leg of the platform, as well as the direction of the Marathon pipeline away from the platform.

13.

On December 18, 1969, in a meeting on the Barge

W-701 attended by Mr. Browne, Mr. Guillory and others, the placement of the buoys which marked all the existing pipelines around Signal Platform A and the route of the proposed Sun pipeline were discussed.

14.

Before moving the Barge W-701 from Sun Platform 1 to Signal Platform A, Mr. Greene, a construction engineer for McDermott, showed Captain Southon a chart with the Marathon pipeline's location marked.

15.

On December 19, 1969, the Tug CHARLES J. CENAC, owned by the Wine Island Pass Towing Co., Inc., towed the Barge W-701 from Sun Platform 1 to Signal Platform A.

16.

The Tug CHARLES J. CENAC and the Barge W-701 circled Signal Platform A at least once before anchors were set because Captain Southon felt the first approach was too near the platform.

17.

Since the Tug CHARLES J. CENAC did not have anchor lifting winches and the Barge W-701 was not equipped with slip buoys, the anchors of the W-701 were set by towing the Barge W-701 to the location where the first anchor, the port stern anchor, was to be dropped. That anchor was dropped from the barge and the tug then towed the barge to the next anchoring location. During the towing from the first anchor position to the second anchor location, the cable on the first anchor was paid out. Upon dropping the second anchor, the starboard stern, cable was let out on the two stern anchors while the tug towed the barge into position for the set-

ting of the third anchor, the starboard bow anchor. The same procedure was followed for the fourth anchor, the port bow anchor, also known as the weather or storm anchor. Approximately 1000 feet of anchor cable was out on each anchor. The evidence is contradictory as to how far west of the northeast corner of the platform the Barge W-701 proceeded before the fourth anchor was set.

The Barge W-701 was positioned roughly parallel to the northeast side of the platform with the bow of W-701 facing in a northwesterly direction. Originally the barge was about 6 to 8 feet from the legs of the platform; later the distance between the barge and the northeast leg of the platform was slightly enlarged. The bow of the barge was approximately 30 to 60 feed past the northeast leg of the platform.

The anchor leads for the starboard bow anchor and the port and starboard stern anchors were all located at those respective corners of the barge. Those three anchors were set so that their anchor lines extended in the direction that their respective corners of the barge pointed. That is, the anchor line of each of these three anchors formed a 135° angle with each side of the barge which formed that corner of the barge. The port bow lead was positioned at the center of the bow of the barge, not at a corner like the other three anchors. Facing to the bow of the barge, the port bow anchor was set to the left of the centerline of the barge. The exact angular deviation from the centerline of the barge is disputed, but from the centerline, the angle was in the range of 0° to 45°.

18.

On December 18, 1969, at approximately 12:10 P.M.,

Mr. Tom West, a Signal construction engineer on Signal Platform A, had informed Mr. Browne of Sun by radio that he, Mr. West, would assist the Barge W-701 with the positioning of its anchors when it arrived at Signal Platform A. However, on December 19, 1969, Mr. West of Signal did not board the W-701 until it was positioned adjacent to Signal Platform A, and the anchors had already been placed.

19.

On December 20, 1969, the seas became rough and it was therefore necessary to move the Barge W-701 away from Signal Platform A.

20.

The evidence is conflicting as to whether the port bow anchor was raised first or last. The captain of the tug recalled that the starboard and port stern anchors were recovered first and the port bow anchor last. Captain Southon believed that the port bow anchor was retrieved first. The tug captain and the barge captain also disagreed on the role of the tug during the anchor recovery. Captain Southon claimed that the tug towed the barge to each anchor's position and then that anchor would be retrieved. The tug captain testified that the tug merely kept the barge away from the platform and that the barge winched itself to each anchor.

The method of winching to the stern anchors would have placed an increased strain on the port anchors.

During the recovery operation the wind and seas were from a northerly direction. The tug was connected by a tow line to the bow of the barge. The tug was positioned north of the barge to prevent the barge from drifting into the platform during the anchor recovery process.

21.

Difficulty was encountered in the raising of the port bow anchor. While recovering that anchor, the barge's anchor raising winch began to labor.

22.

To retrieve the port bow anchor the Barge W-701 employed a procedure commonly known as "dogging" the anchor. This method utilizes the rise and fall of the sea and the buoyancy of the barge to exert a greater pulling force on the anchor line than the winch alone could generate. When the barge is in the trough between waves the anchor cable is recovered. As the barge begins to rise on the crest of the next wave, the buoyancy of the barge pulls the shortened anchor line with great upward force. This procedure was employed by the Barge W-701 to retrieve the port bow anchor.

23.

Later in the day of December 20, 1969, an oil slick was sighted on the surface of the water about 1200 feet from the northwest corner of Signal Platform A.

24.

Every morning the field foreman in Main Pass Block 305 for Signal would relay to shore at about 6:00 A.M. the morning report. The morning report included pressure readings made on Signal Platforms A and D just before the report was relayed to shore. On the morning of December 20, 1969, these pressure readings on Signal Platform A and D were both 62 pounds of pressure in the pipeline systems. On December 21, 1969, the same pressure reading on Signal Platforms A and D were 50 pounds of pressure in the pipeline systems. Only Signal Platforms A and D were producing petroleum at this time while B, C, and E were not active; thus the dual readings.

The pumping and monitoring equipment on Platforms A and D were independent systems. In other words, the oil pumped through the pumping and monitoring devices on Platform D did not pass through Platform A's monitoring devices. The pipeline from Platform D tied into the pipeline system on Platform A downstream of Platform A's monitoring and pumping equipment. That is another reason for the twin readings.

In order to insure a uniform measurement of oil passing through certain volume monitoring devices, back pressure regulators were installed on the "A" and "D" platforms. These regulators were placed downstream from the gauges from which the morning report pressure readings were taken. The purpose of the back pressure regulators was to keep a constant velocity and volume of the oil flowing through the volume monitoring devices so that the measurements of volume would be accurate. The back pressure regulator kept the pressure upstream of such back pressure regulator at a minimum of 50 pounds of pressure in the pipeline system. Therefore, a drop of 62 pounds to 50 pounds of pressure on Platforms A and D was consistent with the conclusion that there was a loss of pressure in the Marathon pipeline downstream of the pressure regulators.

25.

Though the Main Pass Block 305 and 306 oil field contained 5 platforms, A, B, C, D and E, only A, B and D were capable of production in December, 1969. Specifically, A and D platforms were producing at this time; B platform was not. Platforms C and E were not producing, so the pipelines from Platforms C and E were not functioning as a part of the system at that time; therefore, it was necessary to test only the pipelines between Platforms A and B and between Platforms A and

D separately after the oil slick was sighted. The test was accomplished by closing the valve on the feeder pipeline at Platform A, thereby closing the end of the pipeline. The pumping unit on the feeder platform then would be allowed to pump into the line. A rise of pressure in the feeder pipeline would indicate that the line was not leaking, and such was the result of the tests of the pipelines from Platforms B to A, and from D to A. Hence, it was concluded that the rupture had to exist in the Marathon pipeline.

26.

Divers thereafter located the rupture in the Marathon pipeline at a point approximately 550 feet from Signal Platform A. The divers reported a trench-like depression perpendicular to the pipeline in the Gulf floor at the point of the rupture. The divers reported that the pipes were resting in the pipeline's original bed and that the pipes were overlapping at the point of the break. This is a logical result of an upward force lifting the pipeline until it ruptured and then the settling of the pipe into an overlapping position. A force pulling the pipeline along the floor of the Gulf would not have resulted in the overlapping position of the pipe in its natural bed. The divers also found that the Marathon riser had been pulled away from the northwest leg of Signal Platform A.

27.

The section of pipe on each side of the break were removed from the Gulf floor. Examination of the ruptured area revealed that the metal at the point of the break was brittle. When metal is broken in a rapid fashion, this brittleness of the metal will result. If the pipe had been broken by a slow application of force, the metal at the breaking point would have displayed ductile

qualities.

By fitting together the ruptured pipe, it was discovered that the pipe buckled to approximately a 45° angle before rupture and that the point of maximum bending occurred on the top side of the pipe. This revelation indicates an upward pulling force was exerted on the pipeline.

The football-like shape of the pipe at the point of breach also is indicative of the manner in which the rupture occurred. The top and bottom of the pipe at the break were flat, while the sides were pointed outward. The pipeline first cracked on the sides. This "ovalization" is consistent with the conclusion that an upward movement of the pipeline caused the rupture.

28.

The buoyancy of the barge was sufficient to exert a force which would lift the pipeline until it was bent to a 45° angle. The anchor cable of the Barge W-701 was strong enough to bear the weight involved.

29.

The rupture in the Marathon pipeline was caused by the "dogging" of the port bow anchor of the Barge W-701 when the anchor was caught on the Marathon pipeline.

Conclusions of Law

The multi-tiered delegation of work from employer to contractor to subcontractor, the chain of indemnity agreements linking SI.AM, Sun and McDermott, and the plethora of legal contentions presented produces an imbroglio of possible combinations which theoretically

could be employed to reach a finding of ultimate liability. Only one combination of conclusions, however, is supported by the facts and law. The Court, therefore, will not discuss every possible alternative, but will move step by step to a determination of the liability issue. The Court will be guided by the principles and precedents of admiralty law. *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684 (5th Cir. 1970), *cert. denied subnom; Ocean Drilling and Exploration Co. v. Signal Oil and Gas Co.*, 400 U.S. 832, 91 S.Ct. 65 (1970); *Continental Oil Co. v. London Steam-Ship Owners' Mut. Ins. Assn.*, 417 F.2d 1030 (5th Cir. 1969), *cert. denied* 397 U.S. 911, 90 S.Ct. 911 (1970).

Since negligent conduct is the key to a resolution of this case, an examination of the actions of each party is the logical starting point.

Sun, by its desire to connect by pipeline Sun Platform 1 to Signal Platform A, planted the seed from which grew an oak tree of a dispute. The consent of SLAM was absolutely necessary for Sun's plan to proceed. After obtaining a new partner and a hold harmless agreement, SLAM agreed to the scheme. Recognizing the potential liability the Sun-SLAM indemnity agreement could impose, Sun took steps to insure that the work to be conducted by its contractor and subcontractors on and around Signal Platform A was performed in a safe manner. Sun, itself, hired J. C. Chance and Associates to locate the mark with buoys all pipelines which existed in the vicinity of Signal Platform A. This marking process was completed before the Barge W-701 moved from Sun Platform 1 to Signal Platform A. Sun disseminated the information concerning the existence and significance of the marking buoys. The placement of the buoys was discussed on the Barge W-701 the day before the barge

was towed to Signal Platform A. There is testimony, though not from Captain Southon, that Captain Southon was present during these discussions and that the information was communicated to him. Though only involved in inspectorial capacity in the activities performed by McDermott and Williams-McWilliams around Signal Platform A, Sun, at its own expense, had the existing pipelines located and marked. Sun acted reasonably; its conduct was not negligent.

McDermott, the prime contractor of the task to be performed around Signal Platform A, bore a heavy responsibility to insure that adequate measures were taken to prevent damage to SLAM personnel and property. McDermott initiated the necessary preventive measures. Captain Southon testified that before the barge was moved, Mr. Greene, a construction engineer for McDermott, showed him a chart which indicated the location of the Marathon pipeline. Though the chart may have illustrated the proposed location of the Marathon pipeline, the knowledge of the existence and the general location, if not the exact position, of the pipeline was sufficient notice to Captain Southon to color his actions. Mr. Greene accompanied Captain Southon when they travelled to Signal Platform A before the barge was moved. McDermott, though not the owner of the pipeline, communicated to Captain Southon the most up-to-date information concerning the pipeline's position.

McDermott went to great lengths to insure that the captain of the Barge W-701 was familiar with the area into which the barge would be anchoring; McDermott's conduct was not negligent under the circumstances

The SLAM group, as owner of a submerged pipeline, is burdened with certain legal duties concerning the

safeguarding of its submerged pipelines. A pipeline owner must act reasonably in light of the existing circumstances. Here, while performing their normal tasks on Signal Platform A, representatives of the pipeline owner were present constantly in the vicinity of the pipeline. The SLAM representatives knew of the intended activities which were to occur near the platform and pipelines. A pipeline owner's standard of reasonable care may be greater in these circumstances than in the situation where the pipeline rests in an uninhabited, inaccessible or isolated area. *See, Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, supra; Gulf Oil Corp. v. Tug GULF EXPLORER,* 337 F.Supp. 709 (E.D. La. 1971), *aff'd mem.* 472 F.2d 1406 (5th Cir. 1973).

Frequently it was absolutely necessary for vessels to anchor near Signal Platform A for purposes of transferring men, equipment or supplies to the platform. In this case equipment installation on the northeast leg of the platform was the reason for the barge anchoring adjacent to the platform. When it was necessary for vessels to anchor near the platform, the reasonable course of action was to make known to the vessel's captain the location of all pipelines.

Upon learning that the Barge W-701 would be anchoring next to Signal Platform A, SLAM reacted. Captain Southon, himself, testified that before the barge was moved he travelled to Signal Platform A to reconnoiter the area and to communicate with his superiors. Captain Southon testified that a Signal employee specifically indicated to him the location and route of the Marathon pipeline. SLAM acted reasonably when confronted with the knowledge of the barge's intended activities in their area.

Williams-McWilliams asserts that SLAM was contributorily negligent because of the action or inaction of a Signal engineer, Mr. West. From Mr. West's log book entry which states that he would aid the Barge W-701 in the positioning of its anchors and his later admitted failure to do so, Williams-McWilliams finds negligence attributable to SLAM. Before examining this contention of Williams-McWilliams, it is noteworthy that the evidence reflects no request by Captain Southon to any party for aid or advice concerning anchor placement. Captain Southon apparently felt competent to proceed without asistance. By arguing that Mr. West's failure to aid in the anchoring of the barge was contributory negligence, Williams-McWilliams essentially seeks to establish that it is the duty of a submerged pipeline owner to send an employee aboard any vessel which may anchor in the vicinity of the pipeline. Once aboard, Williams-McWilliams asserts, it is then the obligation of the pipeline owner's employee to take charge and direct the placement of anchors.

Such a burdensome duty has never been accepted in the law. *See, Transcontinental Gas Pipe Line Co. v. Mobile Drilling Barge, supra; Gray v. Johansson,* 287 F.2d 852 (5th Cir. 1961), *cert. denied,* 368 U.S. 835, 82 S.Ct. 61 (1961), *rehearing denied,* 368 U.S. 922, 82 S.Ct. 239 (1961). The extensive duty envisioned by Williams-McWilliams is rejected.

The pipeline owner, however, does not operate in a vacuum. Usually the pipeline owner's obligation to third parties is satisfied by giving public notice of the pipeline's existence and location. This is accomplished normally by obtaining construction permits from the appropriate federal and state regulatory agencies, and then building the pipeline in accordance with the permit. *See,*

Transcontinental Gas Pipe Line Co. v. Mobile Drilling Barge, supra; Gray v. Johansson, supra; cr., Gulf Oil Corporation v. Tug GULF EXPLORER, supra.

It was estimated that at a point 500 to 600 feet from Signal Platform A the "as built" location of the Marathon pipeline was from thirteen to thirty feet to the east of the "proposed" site. This deviation is within normally acceptable tolerances. To expect literal compliance with the location set forth in the permit is unreasonable. Offshore operations are not conducted under laboratory conditions and should not be judged by such exacting standards. This minor discrepancy will not be adjudged as a violation of the permit.

At some point, however, a deviation will rise to the level of a permit violation. For example, in *Gulf Oil Corp. v. Tug GULF EXPLORER, supra,* the permit required the pipeline to be buried at least three feet in the floor of the Gulf of Mexico and stated the location of the pipeline. After the permit was issued, a hurricane eroded the Gulf floor around the pipeline, thereby leaving one segment of the pipeline suspended horizontally above the floor of the Gulf. In this position the pipeline formed an arresting barrier. The hurricane not only exposed the pipeline but also caused a 3,000 foot shift in the pipeline's location. These facts were known to the pipeline owner, who did not file an amended permit plat. In that case a violation of the permit was found. In *Pacific Gas and Electric Co. v. SS LOMPOC,* 219 F.Supp. 767 (N.D. Cal. 1968) a permit allowed a pipeline to be built across a main ship channel in a harbor. The permit required a minimum cover of five feet. Later the current denuded the pipeline and an anchor injured the unprotected pipeline. During the original installation of the pipeline, the strength of the current had caused dif-

ficulty in the backfilling of the trench in that same area of the pipeline. From these factors, the court found a violation of the permit.

The miniscule discrepancy which occurred in this case should not be deemed a violation of the permit. Here the permit allowed the pipeline to rest on the floor of the Gulf of Mexico. In the vast expanse of the offshore waters, a thirteen to thirty foot deviation is not a material departure from the permit's allowed location.

Alternatively, Williams-McWilliams seeks to attribute negligence to SLAM for another omission of Signal engineer Mr. West. Mr. West testified that once aboard the Barge W-701 he noticed that the port bow anchor line appeared to extend from the Barge W-701 in a direction that would intersect with the Marathon pipeline. Williams-McWilliams contends that Mr. West should have warned Captain Southon of that fact. The content of the conversation which occurred between Mr. West and Captain Southon on the Barge W-701 after the anchors were placed was not clearly established at trial. Captain Southon remembers the conversation, but not specifics. Mr. West recalls that Captain Southon indicated that he knew the locations of the pipelines, and, therefore, Mr. West relied upon that assertion and did not broach the subject of anchor placement which had been completed at that time.

It is clear that Captain Southon did know the locations of the pipelines when the conversation occurred. Even though Mr. West noted that an anchor line extended in the direction of a pipeline, a representation of knowledge of the pipeline locations by Captain Southon would have squelched all need for discussion of that point. Anchoring vessels in a pipeline field is unavoidable on many oc-

casions. Further, to achieve stability by the proper anchor configuration, placing anchors across known pipelines may be imperative. If the captain indicated that he knew the pipeline locations, which the evidence indicates, Mr. West was under no legal duty to continue the discussion of a routine situation.

Williams-McWilliams has presented no evidence of any conversation between Mr. West and Captain Southon, or any other action, which would have alerted Mr. West to the need to discuss pipeline locations with the captain. With no evidence and mere conjecture supporting their assertion, the alternative argument of Williams-McWilliams must fail. The burden of proving contributory negligence rests on the defendant. On this alternative argument Williams-McWilliams has failed to carry their burden.

All SLAM personnel acted reasonably under the circumstances. SLAM's affirmative action of conveying the information of the pipeline's location to Captain Southon fulfilled its legal obligations. SLAM was not negligent.

SLAM, Sun and McDermott each communicated pertinent information to Captain Southon. Considering the cumulative effect of SLAM, Sun and McDermott's communications, there is no doubt that Captain Southon knew the locations of the pipelines in the area in which he was to anchor.

Notwithstanding the knowledge of the locations of all the pipelines which converged at Signal Platform A, Captain Southon immediately employed the method of "dogging" the port bow anchor line when difficulty with its recovery was encountered.

No investigation of the source of the problem was attempted. The Dick Evans divers on board the Barge W-701 possibly could have been mobilized to make an exploratory dive. Even without such an investigative dive, other options were available. The anchor line could have been marked by a buoy, cut and retrieved later. Or the tug could have towed the barge to another position in an attempt to untangle the anchor and the pipe. No investigative action or alternative methods of retrieval were employed; the captain resorted to an immediate, forceful anchor recovery. In view of the facts known to Captain Southon, untilization of that method of anchor retrieval was negligent.

The negligent manner of recovering the port bow anchor was the proximate cause of the rupture of the Marathon pipeline. By a preponderance of the evidence the plaintiff has proved the required element of causation.

With the die cast on the issue of negligent conduct of each party, Williams-McWilliams seeks to shift the responsibility for Captain Southon's actions. Williams-McWilliams argues that Captain Southon, captain of the Williams-McWilliams Barge W-701, was a borrowed servant of McDermott or Sun. The principles of the borrowed servant theory have been clearly established in numerous cases. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 53 S.Ct. 135 (1932); *Standard Oil Co. v. Anderson*, 212 U.S. 215, 29 S.Ct. 252 (1909); *Dugas v. Pelican Construction Co., Inc.*, 481 F.2d 773 (5th Cir. 1973), *cert. denied*, 414 U.S. 1093, _____ S.Ct. _____ ( ); *Evans v. Triple R. Welding & Oil Field Maintenance Corp.*, 472 F.2d 713 (5th Cir. 1973); *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969).

In *Ruiz*, the indicia of a borrowed servant relationship were explicated as the following:

A. Control of the borrowed employee;

B. Some type of agreement, understanding, or meeting of the minds between the borrowing employer and the lending employer;

C. Acquiescence or agreement by the borrowed servant indicative of the borrowed servant relationship;

D. Temporary termination by the lending employer of its relationship with the borrowed employee;

E. Furnishing by the borrowing employer of the necessary instruments and the place for performance of the work in question;

F. Employment of the borrowed servant over a considerable length of time;

G. Possession of the right to discharge the employee; and

H. Possession of the obligation of the payment of the employee's wages.

In reference to the first indicium stated above, the Fifth Circuit in *Ruiz* stated, 413 F.2d 312-3:

> The factor of control is perhaps the most universally accepted standard for establishing an employer-employee relationship . . . . In considering whether the power exists to control and

direct a servant, a careful distinction must be made "between authoritative direction and control and mere suggestion as to details or the necessary cooperation where the work furnished is part of a larger undertaking." Standard Oil Co. v. Anderson, 212 U.S. 215, 222, 29 S.Ct. 252, 254, 53 L.Ed 480 (1909). "Cooperation as distinguished from subordination is not enough to create an employment relationship." Id. 212 U.S. at 226, 29 S.Ct. at 256.

Coordination and cooperation are the hallmarks of the effort of the oil companies, contractors, and subcontractors as they work together in the offshore search for petroleum. To conclude that the relationship between McDermott and Captain Southon rose above the level of cooperation comtemplated in *Ruiz* and *Standard Oil* would be to close the Court's eyes to the realities and necessities of the offshore oil exploration effort.

Secondly, an understanding or agreement between the borrowing employer and the lending employer as indicative of a borrowed servant relationship, has not been established by the evidence. Though referred to by the parties during the trial as the agreement which governed their later relations, the letter agreement of October 7, 1965, between McDermott and Williams-McWilliams was not introduced into evidence. The Williams-McWilliams offshore rental rate schedule, which was sent to McDermott, was introduced into evidence. A study of this item reveals no evidence which tends to establish an understanding between McDermott and Williams-McWilliams creating a borrowed servant relationship.

As to the acquiescence of the employee and the termination of the lending employer's relations with

employee, Captain Southon never considered himself an employee of McDermott nor did Williams-McWilliams ever not regard him as their employee. For example, Captain Southon called his superior at Williams-McWilliams to seek their approval of the proposed movement of the Barge W-701 to Signal Platform A.

Other potential indicators of a borrowed servant relationship are negated by evidence presented at trial. Williams-McWilliams furnished Captain Southon with the place of work and the necessary equipment for the performance of the job. Williams-McWilliams charged McDermott for Captain Southon's services and then Williams-McWilliams paid Captain Southon his salary from their receipts. Lastly, there is no indication from the evidence that McDermott had the right to discharge Captain Southon if they were dissatisfied with his performance.

A consideration of the totality of circumstances and legal standards to be applied compels the conclusion that no borrowed servant relationship existed between McDermott or Sun and Captain Southon, captain of the Williams-McWilliams Barge W-701.

With the delictual responsibilities of the parties determined, the Court will now consider the contractual structure created by the various indemnity agreements and their attendant shifting of liability. Though Sun and McDermott have been found to be non-negligent, they still face possible liability as indemnitors.

The indemnity provision in the contract between SLAM and Sun entitles the SLAM group to indemnity from Sun.

At this juncture, the indemnity provisions of the contract between Sun and McDermott cannot be definitively construed and applied. A reading of paragraphs 11 and 15 of the Sun-McDermott contract reveals a dichotomy; certain damages may be recoverable by Sun under the indemnity agreement and others may not be indemnifiable. The precise division must await the future trial on the issue of damages.

At this juncture, in view of the Court's resolution of the contractual indemnity questions and pending trial on issue of damages, liability for the negligent acts of Williams-McWilliams rests either completely on Sun, on both Sun and McDermott, or solely on McDermott. In any event, the Court concludes that Sun and McDermott are entitled to indemnity from Williams-McWilliams. This recovery is based on the maritime theory of tort indemnity. *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, supra; Tri-State Oil Tools Industries, Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969). "Maritime law provides for tort indemnity where there is no negligence or only passive negligence attributed to the indemnitee." *Tri-State Oil Tools Industries, Inc. v. Delta Marine Drilling Co.*, 410 F.2d at 186.

An examination of the *Transcontinental* and *Tri-State* cases reveals that the application of maritime tort indemnity is legally sound and just in this case.

In an exhaustive examination of the law of maritime tort indemnity, the court in *Tri-State Oil Tools* stated, 410 F.2d at 181:

> The right [of indemnity] is equitable and is dependent upon the legal principle that

> everyone is responsible for the consequences of his own wrong: that if others are compelled to pay damages that ought to have been paid by the wrongdoer, they may recover from him.

In the present case it is unjust to require Sun and McDermott, who each acted reasonably and non-negligently, to bear the burden of Williams-McWilliams' negligent conduct. Tort indemnity is equitably appropriate.

The application of the liability-shifting device of tort indemnity is legally suited for this case. In the *Transcontinental* case, a submersible drilling barge operated by the defendant ODECO and performing work for the defendant Signal set down on and thereby damaged the plaintiff Transcontinental's submerged pipeline. The court refused recovery on the claims of ODECO and Signal against each other. Each cross claim was based on the maritime theory of tort indemnity. While the court, citing *Tri-State Oil Tools*, noted that indemnity may be had in favor of a party who is non-negligent or only passively or technically negligent, the court concluded that tort indemnity was inapplicable in that case since ODECO and Signal were in pari delicto. The court did not hold that maritime tort indemnity was inappropriate in that species of admiralty cases but only reasoned that an application of tort indemnity was precluded by the finding of active negligence attributable to each prospective indemnitee.

The flexible remedy of maritime tort indemnity was created to avoid unjust results and to establish a policy which would deter negligent conduct. Fairness and justice result when liability is shifted from the non-negligent party to the negligent party. Reasonable and

non-negligent conduct is encouraged by placing liability on the negligent party who is the party best able to prevent the negligence. In this case both rationale are achieved by an application of maritime tort indemnity. This Court will, therefore, invoke the doctrine of maritime tort indemnity in favor of Sun and McDermott against Williams-McWilliams.

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED that preparations proceed for TRIAL on the issue of damages, and thereafter judgment issue.

New Orleans, Louisiana, this 13 day of December, 1974.

United States District Judge
Jack M. Gordon

Appendix I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2791

SIGNAL OIL AND GAS COMPANY, ET. AL.,
Plaintiffs-Appellees,
Cross-Appellants,

versus

THE BARGE W-701, ET. AL.,
Defendants,

SUN OIL COMPANY and ACQUITIANE
OIL CORPORATION,
Defendants-Appellees-
Appellants-Cross-Appellees,

WILLIAMS-McWILLIAMS COMPANY,
Defendant-Appellee and
Cross-Appellee-Cross-Appellant,

EMPLOYERS SURPLUS LINES INSURANCE
COMPANY, ET. AL.,
Defendants-Cross-Appellees-
Cross-Appellants,

J. RAY McDERMOTT AND COMPANY, INC.,
Defendant-Appellant-
Cross-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITIONS FOR REHEARING
(October 19, 1981)

Before GEE, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and number cause be and the same are hereby denied.

ENTERED FOR THE COURT:

_____

Thomas Gibbs, Jr.
United States Circuit Judge

Opposition

Office - Supreme Court, U.S.
FILED
JUN 15 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1128

In the Supreme Court of the United States

October Term, 1981

J. Ray McDermott & Company, Inc.,
Petitioner

VERSUS

Signal Oil and Gas Company,
The Louisiana Land & Exploration Co.,
Amerda Hess Corporation,
Marathon Oil Company,
The Barge W-701,
Sun Oil Company and
Aquitaine Oil Company,
Williams-McWilliams Company,
Employers' Surplus Lines Insurance Company
and Employers' Liability Assurance
Corporation,
Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT

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RESTATEMENT OF THE ISSUES PRESENTED

I.

The Court of Appeals held that the case, on its facts, did not fall within the scope of the Personal Contract Doctrine.

The real issue is, therefore:

> Are the factual findings of the lower court clearly erroneous within the meaning of Federal Rule of Civil Procedure 52(a)?

II.

Does the rule of implied warranty of workmanlike performance deprive a shipowner of its right to seek Limitation of Liability?

III.

When a shipowner is granted the right to limit its liability under the Limitation of Liability Act, what are the obligations of the insurers on its

Umbrella policy, when the District Court has no jurisdiction over those insurers under the Louisiana Direct Action Statute?

IV.

When there is a single claim for physical damage to a pipeline (with different percentages of ownership interest), does pleading Limitation of Liability in the Answer to Plaintiffs' Complaint and in Answer to Cross-Claims of Co-Defendants, create multiple limitation funds?

STATEMENT OF PARTIES

Pursuant to Rule 21.1(b) and Rule 28.1, counsel for Respondents point out that all the parties to the proceeding are not correctly named in the captions appearing in the respective petitions of Petitioners J. Ray McDermott & Company, Inc. and Sun Oil Company and Aquitaine Oil Company, but that all the parties to this proceeding are correctly named in the caption of Respondents' opposition.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

J. Ray McDermott & Company, Inc.,
Petitioner

VERSUS

Signal Oil and Gas Company,
The Louisiana Land & Exploration Co.,
Amerda Hess Corporation,
Marathon Oil Company,
The Barge W-701,
Sun Oil Company and
Aquitaine Oil Company,
Williams-McWilliams Company,
Employers' Surplus Lines Insurance Company
and Employers' Liability Assurance
Corporation,
Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT

STATEMENT OF THE CASE

Respondents deem it necessary to provide the Court with their Statement of the Case, to place the matter in proper perspective.

The Petition of J. Ray McDermott & Company, Inc. (McDermott) seeks to evade the consequences of its independent contractual obligations under a written indemnity agreement with Petitioners, Sun Oil Company and Aquitaine Oil Company (Sun).

Mc Dermott's predicament evolved from the following events.[1]

Signal Oil & Gas Company, Louisiana Land & Exploration Company, Amerada Hess Corporation, and Marathon Oil Company (SLAM) owned and operated an oil production facility off the Louisiana coast in the Gulf of Mexico. SLAM's sub-sea pipeline served as the conduit of oil production from its platform to shore.

Sun, owner of a nearby oil production platform, negotiated with SLAM to tie-in its pipeline to

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1. See Pet. App. A-3-5.

SLAM's pipeline to transfer Sun's product from sea to shore. Sun purchased a ten percent (10%) interest in the SLAM pipeline. Sun also agreed to indemnify SLAM for any losses it might suffer thereby.

Sun contracted with McDermott to perform the pipeline extension between the platforms. McDermott agreed to idemnify Sun for any losses incident to the construction.

To perform the Sun contract, McDermott, by oral agreement with Williams-McWilliams Company (Williams), obtained its Derrick Barge *W-701,* with superintendent and crew, in aid of its construction activities. McDermott and Williams did *not* enter into an indemnity agreement.

During the course of work, Williams' barge superintendent negligently ruptured SLAM'S pipeline while retrieving the *W-701's* port bow anchor.

After the liability phase of the bifurcated trial, the District Judge concluded that (1) the negligence of the *W-701's* superintendent was the sole proximate cause of the casualty and that Williams was, consequently, liable to SLAM for its damages; (2) Sun was liable to SLAM and McDermott was liable to Sun under their respective *contract* indemnities; and (3)

Williams was liable under *tort* indemnity to Sun and McDermott.

On the first appeal (No. 75-2089) the Court of Appeals for the Fifth Circuit affirmed these findings and conclusions in an unpublished *Per Curiam* opinion, dated November 29, 1976. Pet. App. F-1-3.

Following trial on damages, the District Court awarded damages of $1,116,234.62. Pet.App. E-22; C-6-7. Williams, pursuant to 46 U.S.C. §183, was granted the right to limit its liability to $450,000, the market value of the *W-701.* Pet. App. E-22-27; C-7; A-5.

The primary policy ($100,000) and first layer excess policy ($400,000) issued to Williams (totalling $500,000) were held subject to the Louisiana Direct Action Statute, LSA-R.S. 22:655. Pet. App. E-18-21; E-27-30; A-5.

Williams' Umbrella insurance, in excess of its initial $500,000 coverage was held not subject to direct action. Pet. App. E-20-21; E-30;A-5.

Williams' right to Limitation of Liability yielded to Petitioner a recovery of $500,000 from Williams and its insurers. Pet. App. C-7; D-2-3; E-27-30; A-5.

For the balance of its damages, SLAM relied on its *contractual* indemnity against Sun, which, in turn, invoked its *contracutal* indemnity agreement against McDermott. Pet. App. C-7; D-2-3; E-32; A-5.

McDermott, therefore, was "left holding the bag with instructions to fill it. . ." Pet. App. A-5.[2]

SUMMARY OF ARGUMENT

Petitioner's contention that the Personal Contract Doctrine bars Williams' right to Limitation of Liability is fallacious. The facts do not support the argument that Williams warranted it would obtain insurance to protect McDermott against Williams-based liability.

Nor is McDermott's effort to apply the rule of implied warranty of workmanlike service to the situation presented when the Limitation Act is raised as a defense by a shipowner, supported by competent authority. When so considered, it is evident that this rule of implied warranty conflicts with the

---

2. Williams and its insurers have satisfied the second and third Paragraphs of the Judgment of the District Court, dated June 14, 1979. Pet. App. D-1-3.

shipowner's right to seek Limitation of Liability and accordingly should not apply.

Petitioner relies upon authority to support the multiple limitation fund argument that has been soundly rejected by other courts, including the Fifth Circuit.

ARGUMENT

McDermott seeks to disentangle itself from the web of its voluntary contractual indemnity with Sun by urging, that (1) the Personal Contract Doctrine estops Williams from limiting its liability; (2) Williams' Umbrella liability insurers must pay all claims despite Williams' right to limit its liability and despite the Court's lack of jurisdiction over those insurers under the Louisiana Direct Action Statute and (3) by pleading Limitation of Liability in its Answer to Petitioner's Complaint and in Answer to Cross-Claims of Sun and McDermott, Williams created multiple limitation funds.

I. PERSONAL CONTRACT DOCTRINE INAPPLICABLE

The Court of Appeals held that this case, on its

facts, did not warrant application of the Personal Contract Doctrine.

Reliance by McDermott on the Personal Contract Doctrine, as an impediment to Limitation of Liability, is, simply stated, misplaced.

The inaccuracy which pervades the argument on this point is that Respondent warranted to provide insurance coverage to protect McDermott against Williams-based liability.

But Petitioner's theory that such a warranty ever existed is without factual support. The Appellate Court's majority, in analyzing the dissenting opinion of Circuit Judge Albert Tate, Jr., notes forthrightly:

> "We are unable to discern from that opinion, from McDermott's brief, or from a review of the record where this warranty was made by Williams to McDermott . . . The 1969 rental agreement between Williams and McDermott contains no express warranties about insurance . . . Pet. App. A-14.
>
> "We are unwilling so to speculate about the parties' intent; *we do not find this warranty in the executed contract.* (Emphasis Added). Pet. App. A-14-15.

McDermott avers that it relied on the Certificates and Advices of Insurance it received to establish the fact that Williams warranted to provide "sufficient, effectual liability insurance to protect its employer, McDermott". Pet. 10-11, 12-13.

But Williams provided the insurances it undertook to provide pursuant to the Certificates and Advices of Insurance. Nothing in the record is to the contrary.

> "Williams . . . had three policies of insurance *in effect* which would have provided coverage for the liability which it incurred as a result of the rupture of the . . . pipeline . . ." (Emphasis added). Pet. App. E-18-19; A-12.
>
> "Williams purchased all the coverage indicated in its notices of insurance to McDermott. That insurance was in effect and available to satisfy appropriate claims." Pet. App. A-12.

McDermott's dilemma does not result from any contractual breach of warranty or undertaking by Williams.

> "McDermott bears this liability because of its voluntary execution with Sun of an indemnity agreement." Pet. App. A-15.

The findings and conclusions of the lower courts

were correct and not clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1976).

II. WARRANTY OF WORKMANLIKE PERFORMANCE INAPPLICABLE

McDermott next urges that Williams is not entitled to limitation because the negligence of its barge superintendent (imputed to Williams on the issue of exoneration) is tantamount to breach of warranty of workmanlike performance, which in and of itself, bars limitation.

But authorities cited by McDermott to support this theory do not involve the right of a shipowner to seek Limitation of Liability.[3]

The Limitation of Liability Act grants to the shipowner the right to limit its liability when the

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3. *Todd Shipyards Corporation v. Turbine Services, Inc.*, 467 F.S. 1257 (ED La. 1978); *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124 (1956); *Fairmont Shipping Corporation v. Chevron International Oil Company, Inc.*, 511 F.2d 1252 (CA-2 1975); *Italie Societa per Azioni Di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315 (1964).

negligent conduct of its employees causes the loss, provided such conduct was without the owner's privity or knowledge.

The Limitation Act and the rule of implied warranty of workmanlike service are, therefore, mutually exclusive.

> "Williams and McDermott could have agreed to a waiver of Williams' rights under the Limitation Statute by executing an indemnity agreement. *This they did not do.*" (Emphasis added). Pet. App. A-15.

Whether or not an implied warranty of workmanlike service existed, and was breached, Williams' statutory right to Limitation of Liability should not be denied.

III. THE LIMITATION ACT IMPOSES NO OBLIGATION ON UMBRELLA INSURERS

If Respondents properly interpret the second paragraph of McDermott's "Questions Presented for Review" (Pet. i.), it poses the question:

> What obligations do such insurers bear once the insured (Williams) has been granted the right to limit its liability to the value of its vessel, despite the fact

> that the insurers are beyond the jurisidictional reach of the District Court under the Louisiana Direct Action Statute, LSA-R.S. 22:655?

It is well established that the right to limitation is personal to the vessel owner, not to the owner's liability insurers. *Olympic Towing Corporation v. Nebel Towing Company*, 419 F. 2d 230 (CA5-1969), cert. den. 397 U.S. 989.

None of the insurers has sought to limit liability under the Act; none has ever denied coverage. McDermott, having no right of direct action under the Louisiana Statute, has no recourse against these insurers. McDermott must, accordingly, fulfill its *contractual* indemnity to Sun.

IV. NO MULTIPLE LIMITATION FUNDS REQUIRED

The Fifth Circuit considered *The West Point*, 83 F. Supp. 680 (E.D. Va. 1949), which is heavily relied upon by Petitioner in urging its contention that there should be "separate limitation funds for (SLAM's) claim as well as the indemnity claims of McDermott and Sun". (Pet.15). The Court of Appeals rejected that authority, and concluded that:

> "After examination of the few existing

> cases and of the structure of the statute, we conclude that a vessel owner's decision to plead limitation as a defense in a single action with multiple claimants under Sec. 183, rather than to petition under Sec. 185, does not open it to greater liability." Pet. App. A-22.
>
> * * *
>
> "The cursory resolution of the issue in *The West Point* is less satisfactory, however, than that supplied by another District Court in a multiple claim situation . . . Recognizing the scant comment on this issue since *The West Point*, the Court in *Blunk* conducted a searching analysis of the development of the limitation statutes, concluding that the single fund limited to the vessel's value was sufficient to satisfy all the claims . . . We are likewise convinced and find it insignificant that all forty claims in *Blunk* were of an identical nature, while here differing substantive claims are raised." Pet. App. A-23. [4]

While there may be conflicting views expressed by the District Courts in *The West Point* and *Blunk*, the District Court here (Pet. App. E-24-25), as well as

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4. The opening sentence of Circuit Judge Albert Tate's dissent supports the view of the majority on this particular issue. Pet. App. A-35.

the Fifth Circuit, have adopted the analysis expressed in *Blunk*.[5]

The Fifth Circuit, in so holding, speaks as single voice, without any conflict in the Circuits, on this issue.[6] At this stage, therefore, there is no necessity for concluding, as McDermott suggests, that the Court of Appeals decided an important question of Admiralty law, which should be settled by this Court.

CONCLUSION

If McDermott is without tortious sin (Pet. 17), it is not without contractual undertakings. Pet. 8; App. D-2-3; A-15. Sans McDermott's voluntary contractual indemnity to Sun, issues related to "interpretation of this important Federal Statute" (Pet. 9) would have never been devised. McDermott's

5. The District Court correctly distinguished *Cincinnati Gas & Electric v. Abel*, 533 F.2d 1001 (CA6-1976), cited by Petitioners, which dealt with special problems arising when limitation is raised by answer to a State Court suit. Pet. App. E-24.

6. As of this writing, the only other citation of *Blunk* appears in *Corrao v. M/V ACT III*, 359 F. Supp. 1160 (S.D. Fla.-1973), which dealt with the defense of limitation being set out in the answer.

predicament arises not from the "interpretation" of the Limitation Act, but rather because of its voluntary execution with Sun of an indemnity agreement. Pet. App. A-15.

Respectfully Submitted,

Brunswick G. Deutsch
Counsel for Respondents
Deutsch, Kerrigan & Stiles
Bertrand M. Cass, Jr.
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Opposition have been forwarded to each opposing counsel of record by depositing same in the United States Mail, first-class postage prepaid, this 12th day of January, 1982.

BRUNSWICK G. DEUTSCH